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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

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Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 85-305

In the Matter of

SUBSCRIPTION VIDEO
SERVICES

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 19, 1989

By the Commission:

1. Our *Report and Order* in the General Docket 85-305 concluded that subscription video services would henceforth be classified as non-broadcast services. *Subscription Video Services*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988), *requests for rehearing and rehearing en banc denied* August 31, 1988 and February 16, 1989. The Commission has before it two petitions for reconsideration of the *Report and Order*, filed by United States Satellite Broadcasting Company (USSB) and Video 44. The USSB petition is opposed by Home Box Office, Inc. (HBO), and the Video 44 petition is opposed by Monroe Communications.

THE USSB PETITION

2. USSB, a permittee of a direct broadcast satellite (DBS) system, has expressed an intention to provide a broadcast service on that system. USSB sees itself at a competitive disadvantage to others who would operate non-broadcast (*i.e.*, subscription) services in that, as a broadcaster, it would be subject to statutory programming restrictions like the political access requirement of section 312(a)(7) and the equal opportunities requirement of section 315 that do not apply to non-broadcasters. 47 U.S.C. §§ 312(a)(7), 315. In USSB's view, licensees would thereby be encouraged to provide a non-broadcast service, which USSB contends would be contrary to the public interest.

3. USSB also contends that, although broadcasters and non-broadcasters alike will be subject to other non-content related provisions of Title III of the Communications Act, customer-programmers of common carrier satellite licensees will be exempt from even those statutory provisions. Thus, USSB argues, a customer-programmer will have greater access to world capital markets since it would not be limited by the alien ownership restrictions of section 310(b). 47 U.S.C. § 310(b). USSB contends that its ability to raise financing in foreign countries will be unfairly and adversely affected by the application of section 310(b) to licensees but not customer-programmers that will be competing with licensees.[1]

4. USSB has failed to raise any matters warranting reconsideration of the *Report and Order*. In effect, USSB asks us to impose regulatory burdens on non-broadcast services, where such burdens are not required nor in the public interest, simply because broadcasters are subject to those restraints. USSB believes broadcasters otherwise will be at a competitive disadvantage. The differences between services, however, may require the imposition of different statutory and regulatory obligations.

5. For example, whereas section 310(b) applies to broadcast and common carrier licensees, neither the letter nor the intent of that section supports application of alien ownership restrictions to the customers of common carriers, who do not own or control communications facilities. *See Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959); *see also Metrock Corp.*, 46 RR 2d 711, 715 (1979) (customer-programmers of MDS licensees not subject to alien ownership restrictions of section 310). Moreover, the common carrier licensee from whom the customer-programmer obtains access to transmission facilities is already subject to the limitations of section 310.

6. We have indicated from the outset of the DBS proceeding that subscription offerings might at some time be classified as non-broadcast services. *Direct Broadcast Satellites*, 90 FCC 2d 676, 709 (1982). We also made clear that we intended to eliminate all unnecessary regulation in the DBS service, for both broadcast and non-broadcast offerings. *Id.* at 707-09. Presumably, USSB took these regulatory factors into account when it decided that it would provide a broadcast service rather than some other type of service. Indeed, we afforded DBS applicants complete flexibility in structuring their service proposals and expressed no preference for the provision of one type of service over another. *Id.* Accordingly, we think USSB had ample notice of the regulatory environment in which it might operate, and we will not impose unnecessary regulations on non-broadcast service offerings solely to defeat their perceived competitive advantages.

THE VIDEO 44 PETITION

7. Video 44 is the licensee of WSNS-TV, Channel 44, Chicago, Illinois, which operated as a STV station during a portion of its 1979 to 1982 license term. Video 44's 1982 renewal application was challenged, and, after a comparative hearing, the Administrative Law Judge determined that Video 44's performance fell short of the level that would entitle it to a comparative preference for a legitimate renewal expectancy. *Video 44*, 102 FCC 2d 419 (I.D. 1985). On certification from the Review Board, the Commission ruled that the renewal expectancy standard applied to Video 44's 1979-1982 term should be the standard applicable to conventional TV, even though the station operated in an STV mode during a portion of its renewal term. *Video 44*, 103 FCC 2d 1204 (1986).

8. In its petition for reconsideration of the *Report and Order* in this docket, Video 44 contends that our determination that STV should be classified as a non-broadcast service should have retroactive effect. Specifically, Video 44 believes the Commission should apply a non-broadcast renewal standard to its renewal application. However, by *Memorandum Opinion and Order* released January 31, 1989, the Commission determined that Video 44 was entitled to a legitimate renewal expectancy using the conventional broadcast standard. *Harriscope of Chicago, Inc.*,

4 FCC Rcd 1209 (1989). Accordingly, as the ultimate objective sought by Video 44's Petition for Reconsideration has been attained, and as there do not appear to be any other applicants in a similar situation, the Petition is now moot.

CONCLUSION

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by United States Satellite Broadcasting Company, Inc. IS DENIED, and IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Video 44 IS DISMISSED as moot.

10. As an ancillary matter, we take this occasion to correct an error in the *Report and Order*. We therein added a "Non-Government (NG) footnote 148" to section 2.106 of the Commission's rules. 47 C.F.R. § 2.106; 2 FCC Rcd at 1007. That footnote should have been numbered "NG 149," and it was so numbered in the Code of Federal Regulations.

For further information on this proceeding, contact Martin Blumenthal, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] USSB erroneously observes that the reclassification of services embodied in the *Report and Order* "will not apply to subscription television offerings in the DBS service at this time." As set forth in the NPRM, however, the purpose of this proceeding was to reclassify STV and subscription DBS services as non-broadcast services. 51 Fed. Reg. 1817 (Jan. 15, 1986). Thus, the *Report and Order* specifically provides that "subscription DBS may exhibit the same indicia of an intent to limit access to programming, and they would therefore also be classified as non-broadcasting services." 2 FCC Rcd at 1006.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-122

In re Applications of

ROY DAVIS	File No. BPH-870612MA
JOHN H. TOTTEN, SR. & JENNIE L. TOTTEN	File No. BPH-870612MD
MICHAEL J. BENNS	File No. BPH-870615MB
Leonard and Diana Scott d/b/a HIGHLAND BROADCASTING PARTNERSHIP	File No. BPH-870615ME
VIRGINIA ANN SATTLER	File No. BPH-870615MM

For Construction Permit for a New FM Station on Channel 300A in East Ridge, Tennessee

MEMORANDUM OPINION AND ORDER

Issued: May 26, 1989; Released: June 19, 1989

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM station in East Ridge, Tennessee. In a Memorandum Opinion and Order, FCC 88M-4093 (Nov. 30, 1988), the ALJ denied a motion to enlarge the issues designated against Virginia Ann Sattler, filed by Michael J. Benns. In denying the motion, the ALJ incorrectly stated that Benns failed to file a reply pleading. Subsequently, Benns filed a Motion for Reconsideration, asserting that he had in fact filed a timely reply pleading. The ALJ denied reconsideration. He acknowledged that he was unaware of the reply pleading and that he mistakenly failed to consider that pleading, but he concluded that nothing in the reply would cause him to change his original ruling. FCC 88M-4230 (Dec. 9, 1988).

2. Pursuant to 47 C.F.R. § 1.245, Benns filed a Motion for Disqualification of Presiding Officer, arguing that the ALJ exhibited anger when he believed that Benns had not filed a reply; that the ALJ did not engage in reasoned decision making; and that, given the allegedly egregious error of the ALJ, he could not be expected to "reconsider the substance of the matter without some degree of bias." Benns also suggested that the ALJ may have improperly advised Sattler to file a statement to clear up discrepancies and inconsistencies in her filings. Sattler denied contacting the ALJ with respect to the statement and inconsistent filings.

3. The ALJ refused to recuse himself. He denied anger or bias. He pointed out that he had openly acknowledged his error in not considering Benns' reply pleading when he denied reconsideration. The ALJ further stated that he had not had any improper contacts with Sattler and that he had not advised Sattler to file any pleadings or statements. FCC 89M-239 (Jan. 24, 1989). Benns excepted to the ALJ's ruling. In an Order, FCC 89M-426 (Feb. 8, 1989), the ALJ certified the question of his disqualification to the Commission.

4. Now before the Commission for consideration are the ALJ's certification of the Motion for Disqualification; Exceptions to Ruling on Motion for Disqualification of Presiding Officer, filed February 3, 1989 by Benns; a Supplement to Exceptions to Ruling on Motion for Disqualification of Presiding Officer, filed February 8, 1989 by Benns; Comments filed February 17, 1989 by Sattler; and a Motion to Strike, filed March 2, 1989 by Benns.

5. Benns in his exceptions concedes that judicial error is not a basis for finding prejudice. He argues, however, that the lack of reasoned decision making shows that the ALJ is prejudiced in Sattler's favor. He specifically notes that the ALJ referred to the issues requested in the Motion to Enlarge as "vague and amorphous." Sattler's Comments oppose Benns' request to disqualify the ALJ. In his Motion to Strike, Benns argues that Sattler's pleading is not authorized by the Commission's Rules.

6. The substance of an ALJ's ruling is not a basis for disqualification. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). The Commission, however, has recognized that because "it is not always possible to establish an extra-judicial source of bias,. . . the comments and rulings of the trier of fact may be relevant to the existence of prejudice." *KAYE Broadcasters, Inc.*, 35 FCC 2d 548, ¶ 3 (1972). Consistent with our holding in *KAYE* we have reviewed the statements in the ALJ's orders to determine if they evidence bias. Without considering whether we agree with each of the ALJ's rulings, we find that he has attempted to deal with the issues in an evenhanded manner and has set forth reasons supporting his orders that do not reveal bias. Moreover, Benns has not cited any evidence of a display of anger by the ALJ that would warrant his disqualification. Finally, Benns' exceptions do not even pursue his allegation that the ALJ may have improperly requested an additional pleading from Sattler in the face of the denial by both Sattler and the ALJ. In sum, given the paucity of the purported basis for Benns' motion, it is clear that this record contains no evidence of bias or of a predisposition to favor Sattler that would warrant disqualification of the ALJ.

7. In light of this determination, it is not necessary to consider the arguments set forth in Sattler's Comments. Thus, Benns' Motion to Strike will be dismissed as moot.

8. ACCORDINGLY, IT IS ORDERED, That the Exceptions to Ruling on Motion for Disqualification of Presiding Officer filed February 3, 1989 and the Supplement filed February 9, 1989 by Michael J. Benns ARE DENIED; and that the Memorandum Opinion and Order of Administrative Law Judge Walter C. Miller (FCC 89M-231, released January 24, 1989), IS AFFIRMED.

9. IT IS FURTHER ORDERED, That the Motion to Strike, filed March 2, 1989, by Michael J. Benns IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-83

In re Applications of

WEBSTER-FULLER COMMUNICATIONS ASSOCIATES	File No. BPH-870312MJ
ANTHONY E. TRIMBLE	File No. BPH-870313MF
PETER ACHILLES BROIKOU	File No. BPH-870313MJ

For a Construction Permit for a New FM Station on Channel 274A in Webster, New York

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1989; Released: June 19, 1989

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM station in Webster, New York. In a Memorandum Opinion and Order, *Webster - Fuller Communications Associates*, FCC 88M-2140 (July 8, 1988), the ALJ granted a motion filed by Peter Achilles Broikou to designate financial qualification and certification issues against Webster-Fuller Communications Associates. The ALJ subsequently dismissed the application filed by Anthony E. Trimble because he failed to have a transmitter site. FCC 88M-3328 (Oct. 6, 1988). He denied a Joint Request for Approval of Agreement filed September 15, 1988 by Webster-Fuller, Trimble and Broikou, because Trimble's application had been dismissed and because he had granted the motion to designate issues filed by Broikou and he found that Broikou was obligated to prosecute those issues. FCC 88M-3352 (Oct. 7, 1988). The ALJ also denied requests for permission to appeal his refusal to approve the settlement. FCC 88M-3428 (Oct. 17, 1988); FCC 88M-3520 (Oct. 21, 1988).

2. In a Memorandum Opinion and Order, FCC 88M-3476 (Oct. 19, 1988), the ALJ denied a Motion for Summary Decision on the financial qualification and certification issues. On October 25, 1988 Webster-Fuller filed a Motion to Disqualify Presiding Judge. The ALJ denied Webster-Fuller's motion. FCC 88M-3712 (Nov. 2, 1988). Webster-Fuller took exception to the ALJ's ruling. Pursuant to 47 C.F.R. § 1.245(b)(4), the ALJ certified the Motion to Disqualify to the Commission and suspended the hearing pending a ruling on that question by the Commission. FCC 88M-3795 (Nov. 8, 1988). In a Memorandum Opinion and Order, FCC 88R-65 (Dec. 7, 1988), recon. denied, FCC 89R-3 (Feb. 10, 1989), the Review Board affirmed the dismissal of Trimble's application.

3. Now before the Commission are the ALJ's certification of the Motion to Disqualify; a Request for Extraordinary Relief, filed December 12, 1988 by Webster-Fuller; a Motion to Delete Issues filed December 27, 1988 by Broikou and Comments filed January 11, 1989 by Webster-Fuller; an Application for Review filed March 13, 1989 by Trimble; a Request for Stay filed May 5, 1989 by Trimble; a Joint Request for Approval of Settlement Agreement, and an Agreement filed May 10, 1989 and supplemented on May 23, 1989 by Trimble and Webster-Fuller.

4. Webster-Fuller asserts that the ALJ displayed prejudice against its application because of a feud with the Review Board. It argues that his rulings were improperly influenced by the criticism from the Board, that he prejudged the merits of its application, and that he treated a motion by Webster-Fuller as a "laughing matter." In the Request for Extraordinary Relief, Webster-Fuller asks the Commission to approve the settlement agreement. Trimble, in his Application for Review, requests that his application be reinstated so that he can participate in the September 1988 settlement agreement. In the May 10, 1989 Joint Request, Trimble agrees to withdraw his Application for Review and to dismiss his application. The May 1989 settlement agreement states that it supercedes the previous agreement between Webster-Fuller and Trimble contained in the September 1988 settlement proposal. Broikou asks the Commission to delete the financial qualification and certification issues designated against Webster-Fuller. Before reaching the other matters, we will first address the question of whether the ALJ should have recused himself from this proceeding.

I. THE MOTION TO DISQUALIFY

5. To establish a basis for the ALJ's disqualification, Webster-Fuller must show personal bias or prejudice that will impair his ability to act in an impartial manner. *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 ¶¶ 4-5 (1977), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921). A heavy burden of proof is placed on a party seeking to establish bias. *Barnes Enterprises, Inc.*, 66 FCC 2d at 502-03 ¶¶ 6-8. In *Berger*, the Court said that an affidavit alleging bias "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34. Moreover, Webster-Fuller should not be permitted as a "discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable." *Id.* at 31. Ordinarily, "[t]he alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). The Commission has recognized, however, that because "it is not always possible to establish an extra-judicial source for bias, . . . the comments and rulings of the trier of fact may be relevant to the existence of prejudice." *KAYE Broadcasters, Inc.*, 35 FCC 2d 548, 548 ¶ 3 (1972). Thus, we will review the ALJ's rulings and comments for evidence of bias.

6. *The ALJ's Rulings:* In granting a motion to enlarge issues filed by Broikou, the ALJ cited *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (1986). Webster-Fuller sought summary decision on the designated issues, citing a subsequent decision in *Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988). The ALJ denied summary decision. Webster-Fuller asserts that the ALJ did not follow *Northampton* in his order because of the Board's criticism of his ruling on similar issues in the *Las Americas* proceeding. 101 FCC 2d 728, 734 n. 2 (1985) (Separate Statement of Member Blumenthal). Webster-Fuller further charges that in denying summary decision, the ALJ exhibited prejudice by stating that if he "were to decide the false certification issue at this juncture he would resolve it *against*" Webster-Fuller. FCC 88M-3476 at ¶ 4. It also asserts that the ALJ exhibited bias by refusing to approve the settlement agreement or allow an appeal of his order refusing to approve the settlement.

7. The substance of the rulings complained of are not a proper basis for disqualification because they are subject to review. *United States v. Grinnell Corp.*, 384 U.S. at 583; *Berger v. United States*, 255 U.S. at 34. However, consistent with our holding in *KAYE* we have reviewed the statements in the ALJ's orders to determine if they evidence bias. The orders indicate that the ALJ has attempted to deal with the issues raised in a fair and even handed manner. Without considering whether we agree with each of the ALJ's rulings, he has set forth reasons supporting his orders that do not in any way evidence bias.

8. Webster-Fuller's argument that the ALJ's rulings were a reaction to criticism by the Board is not evidence of bias. The ALJ's statement in designating issues against Webster-Fuller that "he will not make that mistake again" (FCC 88M-2140 ¶ 9), is an acknowledgment that his earlier ruling in the *Las Americas* proceeding had been overturned by the Board, and that he would not depart from the standard established by the Board. Although it is a strong statement, it does not show any improper attitude toward the applicant. Webster-Fuller's assertion that the statement establishes that the ALJ would give blind adherence to an inappropriate precedent is pure speculation. Moreover, an ALJ is bound by Review Board precedent unless it is inconsistent with, or overruled by, a Commission order. The ALJ's statement in denying summary decision, that if he "were to decide the false certification issue at this juncture he would resolve it *against*" Webster-Fuller (FCC 88M-3476 ¶ 4) is his assessment of the then existing record. When read in the context of all of the ALJ's rulings, these statements fall far short of the showing of bias or prejudice required for disqualification of an ALJ.

9. *The "Laughter" Incident:* As further evidence of alleged bias, James L. Oyster, Webster-Fuller's attorney, asserts that he encountered the ALJ outside of the hearing, and that the ALJ "began laughing and then proceeded to tell counsel that he could expect a ruling in the mail which would deny the joint request for approval of settlement agreement." Webster-Fuller argues that the ALJ's laughter stemmed from his personnel bias. That argument is also based solely on speculation. There is no showing either of what caused the laughter or of any reason to attribute the laughter to bias. More importantly, this incident is too slender a thread to support disqualification of the ALJ, particularly in light of the even handed manner in which he has proceeded on the record in this proceeding. Thus, we agree with the ALJ that no showing has been made that would warrant grant of Webster-Fuller's Motion to Disqualify Presiding Judge.

II. THE REQUEST FOR EXTRAORDINARY RELIEF

10. In the Request for Extraordinary Relief, Webster-Fuller asks the Commission to approve a settlement agreement with Broikou and Trimble. The ALJ refused to approve the agreement because Trimble's application had been dismissed and because, having granted a request by Broikou to designate financial qualification and certification issues against Webster-Fuller, he found that Broikou was obligated to remain in the proceeding to prosecute those issues. Although Webster-Fuller is requesting review of an interlocutory ruling of the ALJ, we find it appropriate to grant review to facilitate the expeditious resolution of this case. Since the ALJ issued his ruling we have approved a settlement agreement involving another applicant whose application had been dismissed and whose right to participate in the proceeding had been terminated. *Turquesa Enterprises*, 4 FCC Rcd 2559, 2559-60 ¶¶5-8 (1989). Moreover, this matter may be readily resolved on the face of the pleadings now before us without requiring any detailed examination or analysis of other aspects of the record. Thus, we will depart from our usual practice of refusing to consider interlocutory appeals and consider the petition for extraordinary relief.

11. Trimble's application was dismissed by the ALJ because he did not have a reasonable assurance of site availability. The dismissal was affirmed by the Review Board. It is not necessary to determine whether Trimble's application was properly dismissed, because it is clear that his litigation of the dismissal of his application could delay the resolution of this proceeding and the initiation of a new FM service in Webster, New York. Under these circumstances, the dismissal of Trimble's application should not bar approval of the settlement agreement and we will reinstate his application for the limited purpose of allowing him to participate in the settlement. *Turquesa Enterprises*, *supra*.

12. We now turn to Broikou's application. The ALJ, in refusing to approve the settlement, found that Broikou was obligated to prosecute the financial qualification and certification issues against Webster-Fuller. Webster-Fuller's application cannot be granted without a favorable resolution of the issues designated against it. The settlement, however, is not dependent on a grant of Webster-Fuller's application. Agreement, 2 ¶ 3. Moreover, the Mass Media Bureau as a general practice participates in single applicant proceedings where qualifying issues have been designated. Thus, the Bureau can make an independent evaluation of the questions raised concerning Webster-Fuller's qualifications and express its views to the ALJ on the proper course to be followed in this proceeding. *Christian Children's Network, Inc.*, 101 FCC 2d 612, 615 ¶6 (1986). Under these circumstances, there is no apparent purpose for retaining Broikou as an applicant, particularly when he has affirmatively indicated that he no longer wishes to prosecute his application.

13. All of the parties have agreed to the settlement. In the September 1988 agreement Broikou agreed to the dismissal of his application and Webster-Fuller agreed to pay Broikou $25,000, an additional $100,000 upon the grant of Webster-Fuller's application, and to reimburse

Broikou up to $5,000 for any legal fees expended in support of a grant of Webster-Fuller's application. The provisions of the September 1988 agreement pertaining to Broikou remain in force. In the Agreement filed May 10, 1989, that supercedes the September 1988 agreement with respect to Trimble and Webster-Fuller, Trimble agrees to the dismissal of his application for review and his application, while Webster-Fuller agrees to pay Trimble $90,000 within five (5) days after the grant of Webster-Fuller's application. Approval of the agreements will expedite the proceeding by eliminating a need for consideration of the comparative issues, and further appeals by the parties, conserving the resources of the parties and the Commission. The settlement agreements thus, serve the public interest and fully comply with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525(a) that govern settlement agreements. The parties have submitted copies of the agreements between Webster-Fuller, Broikou and Trimble, in which they certified that their applications were not filed for the purpose of reaching or carrying out a settlement agreement. Therefore, we will approve the settlement agreements.

III. THE PETITION TO DELETE ISSUES

14. Broikou asks the Commission to delete the financial qualification and certification issues, designated against Webster-Fuller's application. Deletion of the issues would allow an immediate grant of Webster-Fuller's application. Broikou's pleading, however, is a request for review of an interlocutory ruling by the ALJ. The pleading is procedurally defective under 47 C.F.R. § 1.301(b), prohibiting appeals of interlocutory rulings unless allowed by the ALJ, and it does not demonstrate that a waiver of that rule is warranted. A grant of Broikou's request would involve the Commission in a detailed analysis of a portion of the record that is regularly and most efficiently considered in the first instance by the presiding judge. Accordingly, we believe that the efficiency of the Commission's processes will be best served, by allowing the ALJ, who is most familiar with the facts and the record, to make the initial determinations with respect Webster-Fuller's qualifications. Thus, Broikou's motion will be dismissed.

15. ACCORDINGLY, IT IS ORDERED, That the Order of Administrative Law Judge Walter C. Miller (FCC 88M-3712, released November 2, 1988) denying Webster-Fuller's Motion to Disqualify Presiding Judge IS AFFIRMED.

16. IT IS FURTHER ORDERED, That the Request for Extraordinary Relief, filed December 12, 1988 by Webster-Fuller Communications Associates IS GRANTED to the extent indicated herein and in all other respects IS DENIED; that the application of Anthony E. Trimble (File No. BPH-870313MF) IS REINSTATED for the limited purpose of allowing Anthony E. Trimble to participate in the settlement; that the Joint Request for Approval of Agreement filed September 15, 1988 by Webster-Fuller Communications Associates, Anthony E. Trimble and Peter Achilles Broikou IS GRANTED as modified; that the Joint Request for Approval of Settlement Agreement filed May 10, 1989 and supplemented on May 23, 1989 by Anthony E. Trimble and Webster-Fuller Communications Associates IS GRANTED; and the attached settlement agreements ARE APPROVED; and that the applications filed by Anthony E. Trimble (File No. BPH-870313MF) and by Peter Achilles Broikou (File No. BPH-870313MJ) ARE DISMISSED.

17. IT IS FURTHER ORDERED, That the Motion to Delete Issues filed December 27, 1988 by Peter Achilles Broikou, the Application for Review filed March 13, 1989 by Anthony E. Trimble and the Request for Stay filed May 5, 1989 by Anthony E. Trimble ARE DISMISSED.

18. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to Administrative Law Judge Walter C. Miller for further proceedings consistent with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Privatization of Special Call Sign System for Amateur Stations. PRB-3

ORDER

Adopted: May 31, 1989; Released: June 19, 1989

By the Commission:

I. INTRODUCTION

1. On February 3, 1987, we issued a Public Notice soliciting comments on whether a special call sign system, administered in the private sector, could be implemented in the Amateur Radio Service without requiring the commitment of additional Commission resources.[1] The Notice was issued in response to requests by representatives of the amateur radio community for special call signs for amateur stations.[2]

2. We proposed that the actual station licensing function, including the assignment of an "official" call sign, continue to be performed by this Commission, consistent with our statutory licensing responsibility. Upon request of an individual licensee, a Special Call Sign Coordinator (SCSC), to be established in the private sector, would then assign one or more "special" supplemental call signs to an authorized station. These special call signs could then be used in lieu of the Commission-assigned call sign during the station identification procedures required by Section 97.84 of our Rules, 47 C.F.R. § 97.84.[3]

3. We have carefully considered the comments and reply comments filed in response to the Notice. We conclude that a special call sign program -- even one administered by the private sector -- would require the diversion of significant Commission resources that are essential to the timely and efficient processing of applications for new and upgraded amateur licenses. Under these circumstances, we conclude that establishment of a special call sign system is not in the public interest. Accordingly, we will terminate this proceeding as discussed below.

II. BACKGROUND

4. Our amateur service rules do not provide for granting requests for specific call signs.[4] On the contrary, the amateur station call sign assignment system is highly automated to minimize costs and to maximize efficiency. The call signs are systematically assigned from alphabetized lists arranged according to mailing address and operator class of the licensee.

5. The Notice indicated that there appears to be some desire in the amateur service for station call signs of choice. Although the purpose of the call sign is to provide the listener with a means of determining quickly the source of a transmission,[5] the call sign in the amateur service community is widely regarded as a "pseudonym" for the licensee. For a variety of reasons, some amateur station licensees desire to personalize their call signs. For example, a licensee may wish to have a particular call sign for sentimental reasons or because it is easy to send or receive by telegraphy.

6. We stated in the Notice that we would consider implementation of a specific call sign system if it could be accomplished with no additional cost or workload imposed on our resources. Accordingly, we suggested that one alternative would be to have the official licensing function performed by our staff and then to establish a private sector mechanism for assigning supplemental special call signs. This would be accomplished through the establishment of private special call sign coordinators. The Notice suggested four possible criteria for selection of an SCSC: (1) the ability to assign call signs efficiently and objectively; (2) the ability to provide an accurate on-line data base; (3) the ability to develop procedures designed to minimize use of Commission resources; and (4) the ability to develop procedures designed to minimize the cost to the licensee.[6] We solicited comment on the SCSC mechanism as well as proposals for parties wishing to be an SCSC.

III. COMMENTS AND PROPOSALS

7. Ninety-nine comments and reply comments were submitted in response to the Notice. Fifty-eight commenters supported a system permitting special call signs to be assigned. These commenters were generally individual licensees who wanted personalized call signs for their amateur stations or organizations that wanted to be SCSCs. Forty-one commenters were opposed to a special call sign system administered in the private sector. These commenters analyzed the issues presented in the Notice and raised a number of concerns regarding fairness in the private sector assignment of call signs, compliance with the Commission's Rules and the Commission's responsibility to license.

8. Those opposing a private sector system raised three primary issues. First, there was concern that there would be no way to guarantee that special call signs would be assigned impartially. For example, Mr. H. Presley Foster said that there was significant potential for favoritism in assigning call signs. He noted that the current system is well understood and very fair. He concluded that significant power would be put in the hands of a few who are not accountable to the amateur community as a whole.[7] The comments of Greg Bruce, Maurice Beaver, and the Sterling Park Amateur Radio Club, Sterling, Virginia, expressed similar concerns and emphasized the fairness, competence, and lack of confusion in the present system of assigning call signs.[8] Additionally, the Anne Arundel Radio Club stated that setting up a fair system in the private sector would be very expensive. Those costs would be passed on to the amateur operators who wanted specific station call signs.[9]

9. The second concern expressed by opponents of the special call sign proposal was that if a station performed the station identification procedure using both its Commission-assigned and its special call sign or signs, it would be more time consuming for the listener to determine the name, address and operator class of the licensee.[10] These comments expressed the fear that with multiple call signs the ability of to identify amateur stations would be com-

promised thus hampering efficient conduct of enforcement efforts.[11] Commenters expressing this concern generally stated that the fundamental purpose of the call sign, to assist the listener in determining the source of a transmission, must not be compromised by a special call sign system.

10. Finally, some of the opponents also suggest that the Commission would, in effect, be abdicating its licensing responsibility and would lose control over licensees by permitting supplemental call signs to be assigned in the private sector. ARRL stated further that opponents of an SCSC system are satisfied with the Commission's issuance of call signs because the Commission is answerable to the public interest.[12] Another amateur operator believed that an SCSC system would encourage the use of fictitious special call signs.[13]

11. Thirteen proposals were submitted by persons and organizations that wanted to be SCSCs.[14] Those submitting proposals agreed that there is a demand within the amateur community for the assignment of special call signs. Each entity desiring to be named an SCSC presented information on how it would implement a system meeting the SCSC selection criteria set forth in the Notice.

IV. DISCUSSION

12. The threshold question before us is whether to implement a special call sign system administered by the private sector. We recognize that there is a desire for call signs of choice in the amateur service. Prior to March 24, 1978, we administered a very limited special call sign system.[15] In a sample 8-day period, this very limited system resulted in the issuance of 264 special call signs.[16] Because the processing of such applications took much longer than regular operator and primary station license applications, this system had a significant impact upon our overall processing resources and would have required additional staff positions to continue or expand.[17] During 1987, however, nine years after the discontinuation of the system and in spite of the specific provision in our Rules prohibiting assignment of a specific call sign (*see* 47 C.F.R. § 97.51(b)), we received and denied 246 requests for specific call signs. Therefore, there appears to be a continuing interest in a special call sign system in the amateur community.

13. As we stated in the Notice, our intention was to consider implementation of a special call sign system only if it could be done with no additional cost or workload imposed on our resources. The comments establish that a special call sign system, even one administered in the private sector, would require the diversion of significant Commission resources for, at a minimum, accessing the privately-administered special call sign data base. We cannot afford to divert significant Commission resources from essential activities at this time.[18] In addition, many amateur service licensees believe that our present automated call sign assignment system is "orderly, fair and efficient."[19] Under these circumstances, we conclude that the use of Commission resources to establish a system to provide personalized call signs is not warranted.[20]

V. CONCLUSION

14. Accordingly, IT IS ORDERED, pursuant to the authority contained in 47 U.S.C. § 154(i), that this proceeding IS TERMINATED.

15. IT IS FURTHER ORDERED, that (a) the Motion for Sanctions against Forest Industries Telecommunications filed on September 8, 1987, (b) the Motion to Strike reply comments of Radio Amateur Callbook, Inc. filed on September 18, 1987, (c) the Motion for an Order to Show Cause filed on November 2, 1987, and (d) a document entitled "Disclosure in Compliance with Rule Section 1.1214" filed on November 2, 1987, all filed by Dennis C. Brown and Robert H. Schwaninger, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Notice, FCC 87-35, 52 Fed. Reg. 11543 (1987) (Notice).

[2] The American Radio Relay League, Inc. (ARRL), Callbook Magazine, Central Alabama VEC and Gordon Girton had expressed interest in a special call sign program.

[3] In other words, under the proposal set forth in the *Notice*, a special call sign would be essentially a "vanity" service for the licensee. It would not be a condition for obtaining Commission authorization for an amateur station or in any way replace our licensing responsibilities.

[4] Section 97.51 of our Rules, 47 C.F.R. § 97.51, states that the Commission shall not grant any request for a specific call sign and that the Commission will issue public announcements detailing the policies and procedures governing the systematic assignment of call signs. The details of the current system are contained in *Amateur Radio Station Call Sign Assignment System, Public Notice*, dated November 8, 1985. Mimeo No. 0773.

[5] Section 97.84 of our Rules, 47 C.F.R. § 97.84, specifies the station identification procedures that must be followed when a station is transmitting. Generally, a station must transmit its assigned call sign at the end of each communication and every ten minutes or less during a communication. Our licensee data base contains each assigned call sign indexed to the name and address of the licensee. Commercial publications containing this information are also available.

[6] *See* Notice, 52 Fed. Reg. 11543, 11544 (1987).

[7] Comments of H. Presley Foster, Jr. at 1.

[8] Comments of Greg Bruce at 1; comments of Maurice Beaver at 1; and comments of Sterling Park Amateur Radio Club at 1.

[9] Comments of Anne Arundel Radio Club, Inc. at 1.

[10] Comments of Richard S. Penc at 3 and 4.

[11] Comments of Randall S. Kemp at 2.

[12] Reply comments of ARRL at 6.

[13] Comments of Randall S. Kemp at 1.

[14] Acadiana Computer Systems, Inc., American Radio Relay League, Inc., Association Headquarters, Brown and Schwaninger, Buckmaster, Central Alabama VEC, De Vry In-

stitute of Technology, Dot Enterprises, Forest Industries Telecommunications, Gordon Girton, William Holm, Fred Maia, and Radio Amateur Callbook, Inc.

[15] Specific call signs could be requested by a prior holder of a particular call sign, by a club station that wanted an "in memoriam" call sign and by an Amateur Extra operator who desired a preferred two letter suffix call sign.

[16] *See* Public Notices of April 1, 1977, April 5, 1977 and April 8, 1977.

[17] First Report and Order, Docket No. 21135, 43 Fed. Reg. 7320, 7322 (1978).

[18] In light of our current inability to resolve these overriding resources constraints, we find it unnecessary to consider in this Order the other objections to a special call sign system raised by the commenters in this proceeding.

[19] Reply comments of ARRL, page 3, paragraph 2.

[20] Various motions have been filed in this proceeding by Dennis C. Brown and Robert H. Schwaninger against Forest Industries Telecommunications and Radio Amateur Callbook, Inc. regarding their respective proposals to be SCSCs, including allegations of violations of our *ex parte* rules. Given our decision not to adopt a special call sign program, or to establish an SCSC, these motions are moot and are dismissed. *See* para. 15, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. LONG DISTANCE, INC. File No. I-T-C-89-092

Application for authority to operate as an international resale carrier.

HUGHES LONG DISTANCE, INC. File No. I-T-C-89-095

Application for authority to operate as an international resale carrier.

EASTERN TELELOGIC CORPORATION File No. I-T-C-89-096

Application for authority to operate as an international resale carrier.

FONE AMERICA, INC. File No. I-T-C-89-098

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 2, 1989; Released: June 19, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed by U.S. Long Distance, Inc. (USLD), Hughes Long Distance, Inc. (Hughes), Eastern Telelogic Corp. (ETC) and Fone America, Inc. (FA), on April 7, 10, 13, & 17, 1989, respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on April 26, 1989. No comments were received.

2. ETC is a start-up company. The other applicants are already providing domestic resale service. All four applicants propose to resell international switched voice service in competition with other common carriers already providing resale of such services. ETC has filed the required information pursuant to Section 63.01 of the Commission's Rules. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by USLD, Hughes, ETC and FA.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-092, I-T-C-89-095, I-T-C-89-096, and I-T-C-89-098 ARE GRANTED; and

a. USLD and ETC are authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tarriffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs;

b. Hughes is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs;

c. FA is authorized to provider international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 5 and U.S. Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file a tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP.

Application for authority to lease and operate facilities for direct service between the U.S. and Bolivia — File No. I-T-C-89-093

Application for authority to lease and operate facilities for direct service between the U.S. and Haiti and Panama. — File No. I-T-C-89-094

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 2, 1989; **Released: June 19, 1989**

By the Chief, International Facilities Division:

1. The above-captioned applications filed by MCI Telecommunications Corp. (MCI) on April 18 and 19, 1989, respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Bolivia, Haiti and Panama, and beyond. The applications were placed on public notice on April 26, 1989. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Bolivia, Haiti and Panama by MCI.

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-89-093 and I-T-C-89-094 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 42 voice-grade satellite circuits between the Etam, WV earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Bolivia and Panama furnished by MCI's correspondents;

b. lease from AT&T and operate 42 voice-grade circuits in the Etam, WV earth station;

c. lease and operate 42 voice-grade circuits between the Etam, WV earth station and MCI's West Orange, NJ operating center;

d. use said facilities in subparagraphs a, b and c above to provide MCI's regularly authorized services between the U.S. and Bolivia - 24 voice-grade circuits and Panama - 18 voice-grade circuits and beyond;

e. lease from Comsat and operate 36 voice-grade satellite circuits between the Andover, ME earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Haiti, furnished by MCI's correspondent;

f. own and operate 36 voice-grade circuits in the Andover, ME earth station;

g. own and operate 36 voice-grade connecting circuits between the Andover, ME earth station and MCI's West Orange, NJ operating center; and

h. use said facilities in subparagraphs e, f and g above to provide MCI's regularly authorized services between the U.S. and Haiti and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF THE VIRGIN ISLANDS, INC. — File No. I-T-C-89-056

Application for authority to supplement facilities to points in the Caribbean area and provide direct service to Anguilla, Guadeloupe, Montserrat, St. Kitts and Nevis, and St. Lucia.

Application for authority to provide direct service to France. — File No. I-T-C-89-058

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 7, 1989; **Released: June 19, 1989**

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 14, 1989 by AT&T of the Virgin Islands, Inc. (AT&T-VI), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for supplementary service between the U.S. Virgin Islands and Antigua, Barbados, the British Virgin Islands, Dominica, St. Maarten and Trinidad, and new direct service between the U.S. Virgin Islands and Anguilla, Guadeloupe, Montserrat, St. Kitts and Nevis, St. Lucia and France. AT&T-VI also requests authority to retire the analog St. Thomas-Tortola Microwave system and grant capacity, on an indefeasible right of user (IRU) basis, in the St. Thomas-Tortola Digital Microwave System to Teleglobe Canada and BET, Barbados. The applications were placed on public notice on February 22, 1989. No comments were received. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. Virgin Islands, on the one hand, and Anguilla, Guadeloupe, Montserrat, St. Kitts and Nevis, St. Lucia and France, on the other hand, by AT&T-VI.

3. Accordingly, IT IS ORDERED that application File Nos. I-T-C-89-056 and I-T-C-89-058 ARE GRANTED, and AT&T-VI is authorized to:

a. activate and operate 215 channels in the St. Thomas terminal of the St. Thomas-Tortola Digital Microwave System;

b. acquire on an IRU basis and operate half-interests in the following 64 kbit/s circuits in the Digital Eastern Caribbean Mircrowave System (DECMS):

DECMS Sections	No. of Circuits
Tortola-Saba	144
Saba-St. Kitts	126
St. Kitts-Montserrat	95
Montserrat-Guadeloupe	65
Guadeloupe-Dominica	57
Dominica-St. Lucia	42
St. Lucia-St. Vincent	27
St. Vincent-Grenada	17
Grenada-Trinidad	17

DECMS	Spurs
Saba-Anguilla	10
Montserrat-Antigua	22
St. Vincent-Barbados	10
Saba-St. Maarten	8

c. use the facilities in a and b to provide AT&T-VI's regularly authorized services between the U.S. Virgin Islands and the following points;

Country	No. of Circuits
Anguilla	10
Antigua	22
Barbados	10
British Virgin Islands	71
Dominica	15
Guadeloupe	8
Montserrat	8
St. Kitts & Nevis	31
St. Lucia	15
St. Maarten	8
Trinidad	17
	215

d. activate and operate six channels in the St. Thomas terminal of the St. Thomas-Tortola Digital Microwave System;

e. acquire on an IRU basis and operate half-interests in the following 64 kbit/s circuits in the DECMS:

DECMS Sections	No. of Circuits
Tortola-Saba	6
Saba-St. Kitts	6
St. Kitts-Montserrat	6
Montserrat-Guadeloupe	6

f. use the facilities in d & e above together with matching facilities and facilities wholly provided by its correspondent to provide AT&T-VI's regularly authorized services between the U.S. Virgin Islands and France[1];

g. retire the analog St. Thomas-Tortola microwave system; and

h. make available on an IRU basis half-interests in the following number of circuits in the St. Thomas-Tortola Digital Microwave System:

1). to Teleglobe Canada - 80 circuits;

2). to AT&T-VI's correspondent, BET in Barbados - one circuit.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T-VI and its correspondents in Anguilla, Guadeloupe, Montserrat, St. Kitts, and Nevis, St. Lucia and France, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between AT&T-VI and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

6. Within 60 days after the release of this order, AT&T-VI shall notify the Commission of the accounting treatment that it intends to use in retiring the analog St. Thomas-Tortola microwave system.

7. Upon discontinuance of use and operation of the analog St. Thomas-Tortola microwave system, AT&T-VI shall notify the Commission thereof and submit to the Commission for cancellation any license it possesses covering the subject microwave system.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] AT&T-VI's correspondent in France, Direction des Telecommunications Du Reseau International (DTRE), will provide the channels from Guadeloupe to France by Satellite Facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO, INCORPORATED

AT&T OF THE VIRGIN ISALNDS, INCORPORATED — File No. I-T-C-89-057

Application for authority to acquire and operate additional facilities for service to the Federal Republic of Germany

Application for authority to acquire and operate additional facilities for service to Columbia. — File No. I-T-C-89-059

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 7, 1989; Released: June 19, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 16, 1989 by AT&T of Puerto Rico, Inc. (AT&T-PR) and AT&T of the Virgin Islands, Inc. (AT&T-VI), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for service between Puerto Rico and Columbia and the Federal Republic of Germany (Germany). The applications were placed on public notice on February 22, 1989. Comments were filed and later withdrawn by Telefonica Larga Distancia de Puerto Rico. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-057 and I-T-C-89-059 ARE GRANTED, and

a. AT&T-VI is authorized to make available to Bundespost in Germany by lease 24 whole channels in the St. Thomas terminal of the St. Thomas-Puerto Rico Digital Microwave System (DMS);

b. AT&T-PR is authorized to:

1) activate 24 whole channels in the Puerto Rico terminal of the DMS;

2) acquire on an IRU basis from AT&T-VI half-interests in ten voice-grade circuits in the Venezuela II cable;

3) lease from CANTV of Venezuela ten half-circuits in the Columbus and Pencan III Cable Systems;

4) lease from CTNE of Spain ten half-circuits between the Pencan III terminal in Spain and the Barcelona terminal of the Barcelona-Genoa Cable;

5) lease from CTNE ten half-circuits in the Barcelona-Genoa Cable;

6) lease from ITALCABLE ten half-circuits between the Genoa terminal of the Barcelona-Genoa Cable and the border of Germany;

7) use the facilities in 1) - 6) above, in conjunction with facilities furnished by its correspondent, Bundespost in Germany, to transfer the 14 existing circuits in the Analog Microwave System to the DMS and to establish ten additional channels to provide AT&T-PR's regularly authorized services between Puerto Rico and Germany;

c. AT&T-VI is authorized to make available to TELECOM in Colombia by lease 18 whole channels in the St. Thomas terminal of the DMS;

d. AT&T-PR is authorized to:

1) activate 18 whole channels in the Puerto Rico terminal of the DMS;

2) acquire on an IRU basis from AT&T-VI half-interests in six additional voice-grade circuits in the Venezuela II cable;

3) lease a half-interest in six transiting circuits from CANTV, Venezuela between Venezuela II's terminal in Venezuela and the Venezuela/Columbia border; and

4) use the facilities in 1) - 3) above in conjunction with facilities furnished by its correspondent, TELECOM in Colombia, to transfer the 12 existing circuits in the Analog Microwave System to the DMS and to establish six additional channels to provide AT&T-PR's regularly authorized services between Puerto Rico and Columbia.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T-PR and its correspondent in Germany and Columbia, and copies of the agreements shall be files with the Commission within 30 days of their execution.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between AT&T-VI and AT&T-PR and their correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO, INCORPORATED

AT&T OF THE VIRGIN ISLANDS, INCORPORATED — File No. I-T-C-89-060

Application for authority to acquire and operate additional facilities for service to various Caribbean points and to provide direct service to St. Kitts and Nevis.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 7, 1989; Released: June 19, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 14, 1989 by AT&T of Puerto Rico, Inc. (AT&T-PR) and AT&T of the Virgin Islands, Inc. (AT&T-VI), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for supplementary service between Puerto Rico and Antigua, Barbados, the British Virgin Islands, Guadeloupe, St. Maarten and Trinidad, and direct service between Puerto Rico and St. Kitts and Nevis. The application was placed on public notice on February 22, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Puerto Rico and St. Kitts and Nevis by AT&T-PR.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-89-060 IS GRANTED, and

a. AT&T-VI is authorized to make available on an indefeasible right of user (IRU) basis a whole interest in 101 MAUOs in the St. Thomas terminal of the St. Thomas-Tortola Digital Microwave System to its correspondents listed in the Appendix;

b. AT&T-VI and AT&T-PR are authorized to activate 101 64 Kbit/s channels in the Puerto Rico - St. Thomas Digital Microwave System;

c. AT&T-PR is authorized to:

1) lease a AT&T-VI's half-interest in 101 64 Kbit/s channels in the St. Thomas terminal of the Puerto Rico-St. Thomas Digital Microwave System;

2) acquire on an IRU basis and activate the half-interests in various segments and spurs of the Digital Eastern Caribbean Microwave System (DECMs) as follows:

DECMS Sections	No. of Circuits (64 Kbit/s)
Tortola-Saba	83
Saba-St. Kitts	68
St. Kitts-Montserrat	60
Montserrat-Guadeloupe	49
Guadeloupe-Dominica	28
Dominica-St. Lucia	28
St. Lucia-St. Vincent	28
St. Vincent-Grenada	13
Grenada-Trinidad	13
DECMS Spurs	
Montserrat-Antigua	11
St. Vincent-Barbados	15
Saba-St. Maarten	15

3) establish 8 direct channels to St. Kitts and Nevis; and

4) use the facilities in 1) and 2) above to provide AT&T-PR's regularly authorized services between Puerto Rico and the points listed in the Appendix.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AT&T-PR and its correspondent in St. Kitts and Nevis, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between AT&T-VI and AT&T-PR and their correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	No. of Circuits
Antigua	11
Barbados	15
British Virgin Islands	18
Guadeloupe	21
St. Kitts and Nevis	8
St. Maarten	15
Trinidad	13
Total	**101**

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO, INC.

AT&T OF THE VIRGIN ISLANDS, INC.

File No. I-T-C-89-067

Application for authority to transfer services from the Analog St. Thomas-Puerto Rico Microwave System to the Digital St. Thomas Puerto Rico Microwave System

ORDER AND AUTHORIZATION

Adopted: June 7, 1989; Released: June 19, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 21, 1989 by AT&T of Puerto Rico, Inc. (AT&T-PR) and AT&T of the Virgin Islands, Inc. (AT&T-VI) requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer services routed via the analog St. Thomas-Puerto Rico Microwave System (AMS) to the digital St. Thomas-Puerto Rico Microwave System (DMS) for service between Puerto Rico and various overseas points. The application was placed on public notice on March 1, 1989. Comments were filed and later withdrawn by Telefonica Larga Distancia de Puerto Rico. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-067 IS GRANTED, and

a. AT&T-VI is authorized to lease a whole interest in 121 channels in the St. Thomas terminal of the DMS to AT&T-PR's correspondents as follows:

Country	No. of Circuits
Brazil	19
Canada	18
Cuba	2
Dominican Republic	4
Spain	37
Venezuela	41
Total	**121**

b. AT&T-PR is authorized to:

1. activate 121 whole channels in the Puerto Rico terminal of the DMS;

2. use the above facilities to provide AT&T-PR's regularly authorized services between Puerto Rico and the points listed in a. above.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-533

In the Matter of

Amendment of Section 73.202(b),	RM-6398
Table of Allotments,	RM-6470
FM Broadcast Stations.	
(Clarksville and Lanesville	
Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 6855 (1988), seeking comments on two mutually-exclusive proposals for the allotment of FM Channel 226A as a first local service to Lanesville, Indiana, as requested by Janet Miller ("Miller") (RM-6398), or to Clarksville, Indiana, as requested by Owen-Jackson ("OJ") (RM-6470). Each petitioner filed comments in support of their proposals.[1] OJ filed reply comments. Miller also submitted late-filed reply comments to which OJ responded.[2]

2. As stated in the *Notice*, each petitioner requested the allotment of FM Channel 226A to their respective community. Since the proposals are separated by a distance of 13.6 kilometers (8.4 miles), whereas a minimum distance of 105 kilometers (65 miles) is required between Class A co-channel allotments, they are mutually exclusive. While the *Notice* proposed allotting Channel 226A to either community, our initial determination was to favor Clarksville since it is the larger of the two communities. However, petitioners were requested to demonstrate in comments to the *Notice* why their community should be preferred.

3. Miller admits that although Clarksville, located in Clark County, is larger than Lanesville, the former community presently receives aural service from stations licensed in the county, and from New Albany, Indiana, located in Floyd County, as well as from stations in Louisville, Kentucky. Further, Miller claims that the same tower site could serve either town, and therefore, there should be no distinction in the population count for the respective proposals. Nevertheless, Miller asserts that since Lanesville is located in a rural area, it has a greater need than Clarksville for a first local service.

4. OJ remarks that both Clarksville and Lanesville are located in the vicinity of the greater Louisville, Kentucky, area and thus each receive ample aural service from broadcast stations currently operating at Louisville. Nevertheless, OJ asserts that since Clarksville's population (15,165)[3] is considerably larger than Lanesville's (570), its proposal should be preferred. In further support of its position, OJ states that the Clarksville proposal would provide service to 843,387 persons encompassing an area of 1770.8 square kilometers within its 60 dBu contour, whereas the Lanesville proposal would provide service to 572,831 persons encompassing 1785.3 square kilometers within its reception area. Thus, OJ notes its proposal would cover 270,556 more people than would the Lanesville proposal.[4]

5. We believe that both communities are deserving of a first local FM service. However, Channel 226A is the only channel available to either Clarksville or Lanesville. Thus, we shall base our decision on the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

6. The allotment of Channel 226A to either Clarksville or Lanesville would not provide any first or second aural service but would provide a first local service, thus fulfilling priority (3). Because both proposals would advance priority (3), our decision must consider other public interest factors weighing in favor of one proposal more heavily than the other. In this regard, we note that Clarksville (population 15,165) and Lanesville (population 570) are both located in close proximity to Louisville, Kentucky. Clarksville is 5.6 kilometers (3.4 miles) north of Louisville and Lanesville is 19.7 kilometers (12.2 miles) west of Louisville. A comparison of reception services reveals that each community receives a minimum of five aural services from Louisville FM Stations WAMZ, WDJX, WLRS, WXLN and WVEZ. Although Lanesville is further removed from Louisville than Clarksville, its location does not outweigh the significant difference in population. Thus, we believe that the public interest would be served by allotting Channel 226A to Clarksville since it is the larger community. *See Roswell, Georgia*, 2 FCC Rcd 2775 (1987) and *Seymour, Tennessee*, 2 FCC Rcd 2016 (1987).

7. As indicated in the *Notice*, Channel 226A can be allotted to Clarksville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter is sited at least 7.3 kilometers (4.6 miles) west[5] of the community to avoid short-spacing to Station WVLK-FM, Channel 225C1, Lexington, Kentucky,[6] as well as to Station WXLN(FM), Channel 280A, Louisville, Kentucky.[7]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Clarksville, Indiana	226A

9. The window period for filing applications on Channel 226A at Clarksville, Indiana, will open on **August 4, 1989,** and close on **September 5, 1989.**

10. IT IS FURTHER ORDERED, That the petition for rule making filed by Janet Miller (RM-6398) requesting the allotment of Channel 226A to Lanesville, Indiana, IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In her comments, Miller also incorporated a counterproposal seeking to substitute Channel 234A for proposed Channel 226A at Clarksville in order to satisfy each community under consideration herein in lieu of its proposed use at New Albany, Indiana, in MM Docket No. 88-457. However, comments in the latter proceeding were cut off prior to Miller's comments in this proceeding. Therefore, Miller's counterproposal cannot be entertained in the context of this proceeding or in MM Docket No. 88-457.

[2] Miller's additional reply comments contravene Section 1.415(d) of the Commission's Rules, and also were not filed in conformity with Section 1.420(e). OJ's response, which requested acceptance, states that Miller's comments consist of entirely new matters and do not relate to anything in the record of this proceeding. Since the Commission's Rules do not contemplate the filing of such pleadings beyond the cut-off period, and since Miller's unauthorized comments raise matters which are inappropriate for consideration at this stage of the proceeding, *[See Chester, CA,* 2 FCC Rcd 462 (1987)], we do not believe the public interest would be served by considering them. As a result of this determination, OJ's response is rendered moot.

[3] Petitioner's population figures reported herein are from the 1980 U.S. Census.

[4] Petitioner notes that on the basis of 1986 statistics, the Clarksville proposal would serve 268,500 more persons than would the Lanesville proposal.

[5] Coordinates at the restricted site for Channel 226A at Clarksville are 38-17-01 and 85-50-32.

[6] Coordinates at the licensed site of Station WVLK-FM are 38-02-22 and 84-24-11.

[7] Coordinates at the licensed site of Station WXLN(FM) are 38-15-20 and 85-45-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-282

In the Matter of

Amendment of Section 73.202(b), RM-6630
Table of Allotments,
FM Broadcast Stations.
(Whiting, Crandon and Oshkosh,
Wisconsin)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 31, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. At the request of Sharon Broadcasting Corporation (petitioner), licensee of Station WYTE(FM), Channel 244A at Whiting, Wisconsin, the Commission has before it for consideration a petition for rule making seeking the substitution of Channel 244C2 for Channel 244A at Whiting. Petitioner also seeks the modification of its license to specify operation on Channel 244C2. In order to accomplish the co-channel upgrade at Whiting, petitioner seeks the substitutions of Channel 276A for Channel 244A (vacant) at Crandon, Wisconsin, and Channel 245A for Channel 244A, currently licensed to Station WAHC(FM) at Oshkosh, Wisconsin.[1]

2. Channel 244C2 can be allotted to Whiting in compliance with the Commission's minimum distance separation requirements at the current licensed site of Station WYTE(FM),[2] if the channel substitutions are made at Crandon and Oshkosh. Therefore, we are herein issuing a *Show Cause Order* to Oden Communications Group I, the licensee of Station WAHC(FM) at Oshkosh, seeking comments as to why its license should not be modified to specify operation on Channel 245A in lieu of Channel 244A.

3. Since Crandon is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

4. Commission policy requires that the petitioner reimburse Station WAHC(FM) for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse Station WAHC(FM).

5. We shall propose to modify the license of Station WYTE(FM), Channel 244A at Whiting to specify operation on Channel 244C2, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Whiting.

6. In view of the fact that Whiting, Wisconsin, could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Crandon, Wisconsin	244A	276A
Oshkosh, Wisconsin	244A, 280A	245A, 280A
Whiting, Wisconsin	244A	244C2

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Oden Communications Group I licensee of Station WAHC(FM), Channel 244A, Oshkosh, Wisconsin, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 245A in lieu of Channel 244A.

8. Pursuant to Section 1.87 of the Commission's Rules, Oden Communications Group I may, not later than **August 10, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Oden Communications Group I, to furnish additional information. If Oden Communications Group I, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Oden Communications Group I, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Oden Communications Group I
P. O. Box 707
Neenah, WI 54957

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **August 10, 1989,** and reply comments on or before **August 25, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerrold Miller, Esquire
Miller & Fields, P.C.
P. O. Box 33003
Washington, D. C. 20033
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that the petitioner failed to indicate its compliance with Section 1.401(d) of the Commission's Rules requiring service on the licensee of Station WAHC(FM).

[2] The coordinates are 44-32-36 and 89-40-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-283

In the Matter of

Amendment of Section 73.202(b), RM-6704
Table of Allotments,
FM Broadcast Stations.
(Elkins, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 1, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. Elkins Radio Corporation (petitioner), licensee of Station WELK(FM), Channel 237A, Elkins, West Virginia, has filed a petition for rule making seeking the substitution of Channel 234B1 for Channel 237A and modification of its license to specify operation on the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. The substitution can be made consistent with the Commission's minimum distance separation requirements from the site specified by the petitioner, which is 12 kilometers (7.4 miles) east of Elkins.[1]

3. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules. Petitioner indicates it has taken the initial steps required to insure its proposal will comply with the notification requirements.

4. As requested, we shall propose to modify the license of Station WELK(FM) at Elkins, West Virginia, to specify operation on Channel 234B1 in lieu of Channel 237A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Elkins.

5. Accordingly, in order to provide Elkins with its first wide coverage area FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Elkins, West Virginia	237A, 257A	234B1, 257A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 10, 1989,** and reply comments on or before **August 25, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kathryn R. Schmeltzer, Esquire
John Joseph McVeigh, Esquire
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D. C. 20037-1125
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 38-56-14 and 79-42-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-531

In the Matter of

Amendment of Section 73.202(b),	RM-6383
Table of Allotments,	RM-6667
FM Broadcast Stations.	
(Paris and Dover, Tennessee)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Benton-Weatherford Broadcasting of Tennessee, Inc. (petitioner)[2], the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 6821 (1988), proposing the allotment of Channel 231A to Paris, Tennessee, as that community's second[3] local FM service. Petitioner filed comments reaffirming its intention to apply for the channel. Lon Sosh[4] filed a counterproposal seeking the allotment of Channel 231A to Dover, Tennessee, as that community's first local FM service.[5] Lon Sosh expressed his intention to apply for the new channel, if allotted to Dover. Petitioner filed reply comments.

2. Petitioner, in its reply comments, provides an alternative channel for use at Dover to remove the conflict with the Paris proposal. Petitioner suggests that Channel 248A be allotted to Dover and, as proposed, Channel 231A be allotted to Paris.

3. On May 9, 1989, Lon Sosh filed a motion to withdraw his counterproposal for Dover, stating that for business reasons he will not be permitted to operate an FM station at Dover, and withdrawing his counterproposal and interest in obtaining an FM frequency at Dover. Accordingly, as requested, we shall dismiss the Dover counterproposal. No other party expressed an interest in applying for the allotment. Consequently, Channel 231A can be allotted to Paris, as proposed, consistent with Section 73.207 of the Commission's Rules.[6]

4. In view of the aforementioned, we believe the public interest would be served by the allotment of Channel 231A to Paris, Tennessee, providing the community with a second local FM service, respectively. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Paris, Tennessee	231A, 288A

5. The window period for filing applications will open on **August 4, 1989,** and close on **September 5, 1989.**

6. IT IS FURTHER ORDERED, That the petition Lon Sosh (RM-6667), proposing the allotment of Channel 231A to Dover, Tennessee, IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Dover, Tennessee, has been added to the caption.

[2] Licensee of Station WMUF(AM) at Paris, Tennessee.

[3] The *Notice* incorrectly states the proposal would provide Paris with a first local FM service.

[4] Lon Sosh, d/b/a Sosh Broadcasting Group, Inc., licensee of Stations WTPR(AM) and WAKQ(FM), Paris, Tennessee.

[5] Public Notice of the counterproposal was given February 13, 1989, Report No. 1767.

[6] The reference coordinates are 36-18-12 and 88-19-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-284

In the Matter of

Amendment of Section 73.202(b), RM-6492
Table of Allotments,
FM Broadcast Stations.
(Greenwood, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Red, White and Blue Communications, Inc. (petitioner), licensee of Station KAJJ(FM), Channel 292A, Greenwood, Arkansas, seeking the substitution of Channel 292C2 for Channel 292A and modification of its license accordingly to specify the higher power channel.

2. A staff analysis of the proposal reveals that Channel 292C2 can be allotted to Greenwood in conformity with the minimumum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 25.9 kilometers (16.1 miles) east[1] of the community to avoid short-spacing to Station KKBI(FM), Channel 291C2, Broken Bow, Oklahoma,[2] and to Channel 293C2, Bella Vista, Arkansas.[3]

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 292C2 for Channel 292A at Greenwood, Arkansas. As requested, we also propose to modify the Class A license of Red, White and Blue Communications, Inc., for Station KAJJ(FM) to specify operation on Channel 292C2. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 292C2 at Greenwood, Arkansas.

4. Accordingly, in order to provide Greenwood, Arkansas, with a first wide area coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Greenwood, Arkansas	292A	292C2

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 293C2 at Bella Vista, Arkansas, as follows:

Gayla Joy Hendren
Rte. 5, Highway 72 East
Gravette, AR 72736
(880701MT)

KERM, Inc.
212 North Second St.
Rogers, AR 72756
(880712MJ)

JEM Broadcasting Company, Inc.
216 North Main Street
Bentonville, AR 72712
(880714NT)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 10, 1989,** and reply comments on or before **August 25, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Aaron P. Shainis, Esq.
Lee J. Peltzman, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
Suite 203
2033 M Street, NW
Washington, DC 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the restricted site for Channel 292C2 at Greenwood, AR, are 35-12-25 and 93-58-25.

[2] Reference coordinates at the construction permit site specified for Station KKBI(FM) are 34-14-45 and 94-46-58.

[3] Reference coordinates for Channel 293C2 at Bella Vista, are 36-18-35 and 94-27-02. Although Channel 293C2 was allotted to Bella Vista in MM Docket No. 86-219, 2 FCC Rcd 7415 (1987), it was originally made available to that community in MM Docket No. 84-231 (at reference coordinates 36-25-46 and 94-13-53). Thus, it retained the filing status accorded in the latter proceeding. The window period for filing applications for Channel 293C2 at Bella Vista opened on June 3, 1988 and closed on July 14, 1988. At the time the instant petition was filed, there were no applications on file at the Commission for Channel 293C2 at Bella Vista. However, three applications were subsequently filed (File Nos. 880712MJ, 880714NT and 880701MT). The proposal to substitute Channel 292C2 for Channel 292A at Greenwood meets the spacing requirements at the site specified in only one of the three pending applications at Bella Vista (880701MT), at reference coordinates 36-18-21 and 94-27-29. A staff analysis was undertaken to determine whether an alternate Class C2 channel could be substituted at Bella Vista to accommodate all three applicant's sites. We also reviewed the possibility of other channels adjacent to the Greenwood proposal. However, neither of those options were available. Thus, we will serve a copy of this *Notice* on the applicants for Channel 293C2 at Bella Vista to advise them that they may be required to amend their applications in the event this proposal is ultimately adopted, and to invite their comments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

Pass Word, Inc. MW-5
1303 W. First Avenue
Suite 200
Spokane, Washington 99204

For a Waiver of the Rules to Provide
Private Carrier Paging Service to an
Agency of the Federal Government

ORDER

Adopted: June 9, 1989; Released: June 19, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. On September 13, 1988, Pass Word, Inc. (Pass Word) filed a request for waiver of Sections 90.75 and 90.179 of the Commission's Rules, 47 C.F.R. §§ 90.75 and 90.179. These rule sections provide, in essence, that Business Radio Service private carrier paging licensees[1] may provide service only to Business Radio Service eligibles.[2] Pass Word, a licensee of several Business Radio private carrier paging systems operating on 152.480 MHz in the Spokane, Washington area, seeks to provide paging service to the Drug Enforcement Administration (DEA), an agency of the federal government. Because federal agencies are not eligible in the Business Radio Service, Pass Word may not provide service to DEA absent a waiver of Sections 90.75 and 90.179. For the reasons discussed below, we are granting Pass Word's request on a conditional basis.

II. BASIS FOR WAIVER

2. In support of its waiver request, Pass Word states that DEA has requested to operate seven pagers in the eastern Washington and northern Idaho areas on Pass Word's paging system[3] in an effort to conceal more effectively DEA transmissions associated with agency investigations. In this regard, Pass Word has furnished a statement from a DEA official indicating that DEA's communications on the dedicated frequencies authorized for its use can be easily intercepted and that these frequencies are, therefore, not suitable for its law enforcement security needs.[4] Pass Word maintains that local common carrier paging systems do not provide DEA with an acceptable alternative because these systems do not have the coverage or the digital signalling required for maximum security.

III. DISCUSSION

3. The Commission is reexamining its eligibility criteria in the Private Land Mobile Radio Services consistent with its statutory mandate to promote spectrum efficiency and make private radio services accessible to the largest feasible number of users.[5] To this end, the Commission recently expanded end-user eligibility in the Specialized Mobile Radio (SMR) Service to include individuals and federal government entities.[6] Consistent with this approach, the Commission has initiated a rule making proceeding that proposes, *inter alia*, to expand the eligibility criteria for end-users of private land mobile facilities by allowing Business Radio Service licensees, such as Pass Word, to provide paging service to all Part 90 eligibles, individuals, and the federal government.[7] This proposal would enable private carriers in the Business Radio Service to offer paging service to the same pool of entities that are eligible to receive SMR service, including individuals and the federal government.

4. Rule waivers are considered on a case by case basis to determine if there are unique circumstances that justify the relief requested. In acting on Pass Word's request, we must consider whether there are any reasonable alternative solutions within the existing rules and whether a waiver would frustrate the public interest policy the rule seeks to protect.[8] Pass Word maintains that there are no satisfactory alternatives under the Commission's Rules that can address DEA's security concerns. Thus, we conclude that granting Pass Word a waiver of Sections 90.75 and 90.179 to permit it to provide paging service to DEA is in the public interest in that it will assist DEA in its enforcement activities. The waiver grant, however, will be conditioned on the outcome of the Commission's ultimate determination in the PR Docket No. 89-70 rule making proceeding that has proposed to include the federal government among private carrier paging user eligibles.[9]

5. Accordingly, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, IT IS ORDERED that the request of Pass Word, Inc. for waiver of Sections 90.75 and 90.179 of the Rules to allow it to provide private carrier paging service to the Drug Enforcement Administration IS GRANTED, for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] A private carrier paging licensee is an entity licensed in the Private Land Mobile Radio Service that is authorized to provide communications service to other private service eligibles on a commercial basis. 47 C.F.R. § 90.7.

[2] Any individual or entity primarily engaged in the operation of a commercial activity is eligible for an authorization in the Business Radio Service. 47 C.F.R. § 90.75.

[3] Pass Word's paging system servicing these areas consists of Business Radio stations WNIR 529, WNLK 282 and WNKN 704 operating on 152.480 MHz in the Spokane, Washington vicinity.

[4] Letter from Gregory K. Williams, DEA Resident Agent in Charge, to Pass Word, Inc., August 30, 1988.

[5] 47 U.S.C. §§ 332(a)(2) and (a)(3).

[6] *See* Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *aff'd* Memorandum Opinion and Order, PR Docket No. 86-404, 3 FCC Rcd _____, (Released January 4, 1989); and 47 C.F.R. § 90.603. The Commission has also broadened the eligibility criteria in the private radio services by adopting inter-category sharing rules, Report and Order, PR Docket No. 86-160, 2 FCC Rcd 513 (1987); 47 C.F.R. § 90.621(g), and rules permitting "private carriers" in the Special Emergency Radio Service, Report and Order, PR Docket No. 87-312, 3 FCC Rcd 3677 (1988); 47 C.F.R. §§ 90.33 and 90.52.

[7] *See* Notice of Proposed Rule Making (Notice), PR Docket No. 89-45, FCC No. 89-70, 4 FCC Rcd 2589, (1989).

[8] *See* 47 C.F.R. §§ 1.3, 90.151; WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969): Thomas Radio v. FCC, 716 F.2d 921 (D.C. Cir. 1983).

[9] We do not normally favorably entertain requests for waiver of a provision of a Commission Rule that is the subject of a pending rule making proceeding. In the instant case, however, grant of the requested waiver will not prejudge or otherwise prejudice the pending proceeding. Moreover, Section 873(b) of the Controlled Substances Act, 21 U.S.C. § 873(b), provides that it is the duty of every federal agency, upon request of the Attorney General of the United States, to provide him with assistance in carrying out his drug abuse prevention and control responsibilities. Our action allows Pass Word to provide DEA (a unit of the Department of Justice) with the communication capabilities it seeks in support of its drug control responsibilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 94 of the Commission's Rules to Allocate Spectrum in the 896-901 MHz and 935-940 MHz Frequency Bands for Multiple Address System and Point-to-Point Operations — RM-6579

ORDER

Adopted: June 9, 1989; Released: June 19, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. In this Order we consider a petition for rule making filed by the American Petroleum Institute (API).[1] API asks the Commission to amend the rules governing use of 200 channel pairs in the 896-901 MHz and 935-940 MHz bands. Currently, these channels are allocated nationwide for land mobile operations. API asks that the Commission reallocate the channels for fixed operations, specifically for multiple address systems (MAS) and point-to-point operations, in areas more than 100 miles from the top 50 urban markets. We placed API's petition on public notice[2] and received comments from nine parties.[3] Upon review of the record, we have decided that API's request is premature, and, therefore, we shall dismiss it without prejudice. *See* 47 C.F.R. §1.401(e).

II. BACKGROUND/COMMENTS

2. In 1986, the Commission allocated the 200 channel pairs for private land mobile services and designated them specifically for the use of Specialized Mobile Radio (SMR) systems.[4] In that same year, the Commission issued a public notice explaining that licensing on the channels would take place in stages.[5] During Phase I the Commission would accept applications only in the urban centers of the nation's largest 50 markets (known as Designated Filing Areas or DFAs). This would allow service to be provided first in areas most in need of additional communications capacity. *See Allocation Order* at ¶ 80. After the channels were assigned in the DFAs, the Commission would initiate Phase II to extend the licensing of the channels out to a 100 mile radius of the centers of the DFAs. At present, Phase I is still in progress.[6] The Commission has not yet initiated Phase II or taken any action applicable to use of the channels at locations more than 100 miles from the centers of the DFAs.

3. API proposes that the Commission reallocate the 200 channels for operational fixed use in areas farther than 100 miles from the top 50 markets. In support of its request, API argues that there is a critical shortage of spectrum available for point-to-point and MAS operations in many non-urban areas, particularly in locations with large oil and gas operations. *See* API Petition at 5-6. API identifies nine areas outside the top 50 markets as illustrative of its point and states that additional areas also are experiencing shortages.[7] According to a survey of those API members already using multiple address systems, there is interest in constructing between 450 and 520 more systems over the next five years if enough spectrum is available. API Petition at 9, Appendix B; API Reply at 15-16. On the other hand, API argues that SMR systems do not need additional spectrum in most areas outside the top 50 markets.[8] API Petition at 5. Commenters supporting API's petition agree that American industry needs additional spectrum for point-to-point and MAS operations and suggest that reallocation of the 200 channels at issue would help to meet this need. *See* UTC Comments at 2-3; Granger Comments at 2; Harris Comments at 2.

4. Commenters opposing API's petition argue that reallocation of the 200 channels would be premature because the Commission has not yet permitted SMR systems to apply for the spectrum outside the DFAs. *See* NABER Comments at 3; AMDC Comments at 3; ASNA Reply Comments at 2. They contend that there is a growing need among SMR operators for the channels at issue and that several markets outside the top 50, such as El Paso and Austin, Texas, already have no 800 MHz frequencies available in the SMR Category. *See* AMDC Comments at 4-5; Uniden Comments at 3-4. Finally, they state that API has not demonstrated a need for the channels. *See* NABER Comments at 4-8.

III. DISCUSSION

5. We agree that API's proposal is premature.[9] The Commission allocated these channels only a few years ago, and we have not yet made the channels available outside the top 50 urban centers. Essentially, API asks us to eliminate the third stage of our licensing procedures at a time when we have not completed the first stage or initiated the second stage. Until we initiate and complete Phase II, we will not be able to determine the effect that use of the channels outside the top 50 markets will have on SMR use within the DFAs. Also, until we see how SMR use develops in Phase II, we cannot accept API's argument that SMR operators will not apply for or use the channels outside the top 50 markets. While not yet available for licensing, these frequencies have been allocated generally for land mobile use and earmarked specifically for SMR services. It is too early in the licensing process to assess whether the channels should be reallocated for other purposes, and, thus, we shall dismiss API's petition. We note, however, that the Commission recently allocated an additional 30 channel pairs for point-to-point operations and 40 channel pairs for MAS operations. *See* Second Report and Order, Gen. Docket 82-243, 4 FCC Rcd 2012 (1989). This spectrum should provide relief for the growing demand for fixed operations.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. §§ 1.401 and 1.407 of the Commission's Rules, that the Petition for Rule Making filed on October 27, 1988 by the American Petroleum Institute is DISMISSED without prejudice.

7. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] API, Petition for Rule Making, RM-6579 (October 27, 1988) (API Petition).

[2] FCC, Public Notice, Mimeo No. 1758 (November 14, 1988).

[3] Statements in support of the petition were filed by the Harris Corporation -- Farinon Division (Harris), DSC Granger Associates (Granger), the Utilities Telecommunications Council (UTC), Local Radio Networks, and Multipoint Networks, Inc. Opposing statements were filed by American Mobile Data Communications, Inc. (AMDC), the American SMR Network Association, Inc. (ASNA), Uniden Corporation of America (Uniden), and the National Association of Business and Educational Radio, Inc. (NABER).

[4] *See* Report and Order, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986) (*Allocation Order), erratum* 51 Fed. Reg. 39662 (October 30, 1986). At that time, the Commission allocated a total of 399 channel pairs for private land mobile radio services other than public safety. In addition to the 200 SMR channels that are the subject of this proceeding, the Commission also allocated 100 channel pairs for the Business Radio Service and 99 channel pairs for the Industrial and Land Transportation Services.

[5] *See* FCC, Public Notice, Private Land Mobile Application Procedures, Mimeo No. 0539 (November 4, 1986), *published at* 1 FCC Rcd 543 (1986).

[6] For example, the channels have not yet been assigned in top markets near the Canadian border pending further negotiations with Canada.

[7] The areas identified are the western San Joaquin Valley in California; Bakersfield, California; Post, Texas; Ft. Stockton, Texas; Ackerley, Texas; Andrews, Texas; Midland, Texas; Odessa, Texas; and Maljamar, New Mexico. API Reply at 17.

[8] API concedes that there are a few areas outside the top 50 markets in which SMR systems may need 900 MHz spectrum as evidenced by waiting lists for 800 MHz spectrum. API Reply at 12-13. In these areas, API proposes that we split the 200 channels equally between fixed and mobile operations. *Id.* at 13.

[9] *See* Memorandum Opinion and Order, Electromagnetic Pulse Effects, 2 FCC Rcd 2739 (1987); Order, Novice Class Use of 220 MHz Band, slip op. (August 28, 1984) (denying petitions for rule making as premature).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
Relating to Program
Exclusivity in the Cable
and Broadcast Industries

ERRATUM

Released: June 12, 1989

1. On May 18, 1988, the Commission adopted a *Report and Order*, FCC 88-180, 3 FCC Rcd 5299 (1988), in the above-captioned proceeding, which reinstituted cable television syndicated exclusivity rules and modified existing network non-duplication rules, and on February 22, 1989, the Commission adopted a *Memorandum Opinion and Order*, FCC 89-72, 4 FCC Rcd 2711 (1989), which modified certain aspects of these rules. As set forth below, this *Erratum* corrects several errors contained in the *Report and Order* and *Memorandum Opinion and Order*.

2. In paragraph 178 of the *Report and Order*, 3 FCC Rcd at 5328, the authority cited for the action taken in that decision is corrected to read: "Sections 4(i), 4(j), 301, 303, 601(4) and 624 of the Communications Act of 1934, as amended".

3. In Appendix B of the *Report and Order*, 3 FCC Rcd at 5329, Section 76.5(nn), which sets forth the definition of "syndicated program," contains a cross reference to the section in our rules that defines network programming. This cross reference is corrected to read: "Section 76.5(o)".

4. The "Effective Date" element of the preamble in the summarized version of the *Report and Order* published in the Federal Register at *Cable Television Services; Program Exclusivity in the Cable and Broadcast Industry*, 53 FR 27167 (July 19, 1988), is corrected to read: "August 18, 1988.".

5. Footnote 189 of the *Memorandum Opinion and Order*, 4 FCC Rcd at 2739 n.189, is corrected to read *"See Report and Order,* 3 FCC Rcd at 5313-14.".

6. The passage in the second sentence of paragraph 87 of the *Memorandum Opinion and Order,* 4 FCC Rcd at 2727, which states that the Commission "will require that affiliates seeking network non-duplication protection pursuant to the provisions of an affiliation agreement entered into *before* the effective date of this *Order* provide notice to the affected cable operator pursuant to Section 76.94 no later than June 19, 1989," (emphasis in original), is corrected to read:

> will allow affiliates seeking network non-duplication protection pursuant to the provisions of an affiliation agreement entered into *before* the effective date of the amendments adopted by this *Order* to provide notice to the affected cable operator pursuant to Section 76.94 no later than June 19, 1989,

7. In the same paragraph (paragraph 87) of the *Memorandum Opinion and Order,* 4 FCC Rcd at 2727, the last sentence, which addresses network affiliation agreements entered into after "this *Order,*" is corrected to read:

> With respect to network affiliation agreements entered into *after* the effective date of the amendments adopted by this *Order,* the affiliate must provide the necessary notice no later than 60 days after entering into the relevant agreement, as described at paragraph 82 above.

8. In paragraph 107 of the *Memorandum Opinion and Order,* 4 FCC Rcd at 2730, which cites the authority for the action taken in that decision, Section "302" is corrected to read: "301".

9. In Appendix A of the *Memorandum Opinion and Order,* 4 FCC Rcd at 2730, paragraph (b) of Section 76.94 is corrected by adding the following ending clause to the first sentence of that paragraph:

> ; provided, however, that for such contracts signed before May 5, 1989, a broadcaster may provide notice on or before June 19, 1989.

10. In Appendix A of the *Memorandum Opinion and Order,* 4 FCC Rcd at 2731, the first sentence of Section 76.97 is corrected to read: "The network non-duplication protection and exceptions thereto outlined in Sections 76.92-76.95 shall become enforceable on January 1, 1990."

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

PACIFIC BELL — Transmittal No. 1406
Revisions to Tariff F.C.C. No. 128

BELL ATLANTIC TELEPHONE COMPANIES — Transmittal No. 304
Revisions to Tariff F.C.C. No. 1

GTE TELEPHONE OPERATING COMPANIES — Transmittal Nos. 486 and 511
Revisions to Tariff F.C.C. No. 1

CONTEL TELEPHONE COMPANIES — Transmittal No. 25
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: June 1, 1989; **Released: June 5, 1989**

By the Chief, Common Carrier Bureau:

1. The captioned tariff transmittals, which were filed between March 3, 1989 and June 1, 1989, propose individual case basis (ICB) rates for DS3 service. These tariff revisions are scheduled to become effective between June 6, 1989 and June 9, 1989. The filings of Pacific Bell and Bell Atlantic propose ICB rates for services that are not covered by the terms of their general DS3 tariffs that became effective April 1, 1989. The GTE transmittals propose ICB rates that conform to the rate structure of GTE's pending general DS3 tariff. Finally, Contel provides only three DS3 services in its various service territories.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[1] The offerings proposed in the captioned transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1406, Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 304, GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal Nos. 486 and 511, and Contel Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 25 are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day. For this purpose, we waive Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, and assign Special Permission No. 89-389.

5. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell, the Bell Atlantic Telephone Companies, the GTE Telephone Operating Companies, and Contel Telephone Companies shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for the services which are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846; Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES — Transmittal Nos. 281 and 289
Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: June 2, 1989; Released: June 7, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned tariff transmittals, scheduled to become effective June 7, 1989 and June 19, 1989, respectively, the Ameritech Operating Companies (Ameritech) propose individual case basis (ICB) rates for DS3 service.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[1] The offerings proposed in the captioned transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation.

3. We note also that Ameritech now has in effect a general DS3 rate structure. That rate structure includes averaged rates for DS3 channel mileage and DS3 to DS1 multiplexing but retains ICB pricing for the DS3 Local Distribution Channel rate element. As we have stated in the past, that rate structure represents a step forward but it does not resolve the concerns that prompted us to institute the investigation in Docket 88-136. We therefore included the Ameritech tariff in the investigation.[2] We have permitted other Ameritech ICB filings that conformed to Ameritech's general rate structure to become effective, subject to investigation, after a one day suspension.[3] The captioned filings, however, do not conform to Ameritech's general rate structure. Given the concerns which the Commission is addressing in the investigation, and because Ameritech has provided no basis for its failure to include these proposed offerings in its general DS3 rate structure, we do not believe the public interest would be served by permitting these tariff revisions to take effect. We conclude that these transmittals raise sufficient questions of lawfulness as to require suspension for the full five month period permitted by Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

4. Accordingly, IT IS ORDERED that Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 281 and 289 are subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for five months. For this purpose, we waive Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, and assign Special Permission No. 89-391.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846; Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

[2] Ameritech Operating Companies, Tr. No. 287, DA 89-484, released Apr. 28, 1989 (Com.Car.Bur.).

[3] Ameritech Operating Companies, Tr. Nos. 265, *et seq.*, DA 89-499, released May 3, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. Nos. 1 and 2

Transmittal No. 1568

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1989; Released: June 8, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 10, 1989, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 25, 1989, on 45 days' notice. The pending tariff revisions propose to offer a promotion for customers subscribing to AT&T's Megacom, Megacom 800, and Software Defined Network (SDN) services. Under this promotion, AT&T would provide qualifying new customers[1] for these services what AT&T describes as "multiplexing equipment" at no charge.[2] AT&T asserts that competing interexchange carriers have provided equipment free of charge as an inducement to subscribe to services that compete with Megacom, Megacom 800, and SDN. AT&T concludes that, in order to attract new business customers, it must be able to offer a comparable promotion.[3]

2. MCI Telecommunications Corporation (MCI), the Independent Data Communications Manufacturers Association, Inc. (IDCMA), and the North American Telecommunications Association (NATA) filed petitions to reject the captioned transmittal.[4] In addition, US Sprint Communications Company Limited Partnership (US Sprint) filed a petition to reject or suspend and investigate.[5] Petitioners argue both that the pending transmittal violates the Commission's *Computer II* Rules and various provisions of the Communications Act. AT&T filed a reply to these pleadings. For the reasons stated below, we reject the pending transmittal as patently unlawful.

II. PLEADINGS

A. *Violation of Computer II Rules*

3. Petitioners contend that AT&T's proposal is inconsistent with the rules established by the Commission in its *Computer II* Proceeding.[6] NATA, for example, notes that the *Computer II* Rules prohibit both the provision of customer premises equipment (CPE) under tariff and the bundling of CPE with regulated transmission services. NATA argues that AT&T's proposal would unlawfully retariff CPE in violation of the *Computer II* Rules. NATA also observes that AT&T has not attempted to show that waiver of those rules is warranted.[7] In addition, NATA asserts, AT&T's proposed offering of free CPE with its tariffed services is a classic case of the bundling of equipment and service charges prohibited by the Commission's Rules.[8] NATA concludes that, although it expresses no opinion on the lawfulness of the promotions that AT&T alleges other interexchange carriers conduct, these practices cannot justify permitting AT&T to retariff and rebundle CPE.[9]

4. US Sprint and IDCMA generally agree with NATA's position that AT&T's proposed tariff revisions violate the *Computer II* Rules.[10] In addition, US Sprint and MCI contend that they do not provide similar equipment free of charge, thus in their view eviscerating AT&T's argument for the need for the proposed promotion.[11]

5. In reply, AT&T asserts that there can be no legitimate concern that its promotion would impair competition for the equipment that it proposes to provide. According to AT&T, the market for such equipment is intensely competitive. Moreover, AT&T asserts, precedent supports the conclusion that the inclusion of CPE in its promotion does not constitute the tariffing of CPE.[12] AT&T cites several cases which it contends demonstrate that "referencing a specific type of CPE . . . in AT&T's promotional tariff cannot be construed as 'tariffing' CPE, any more than a promotion involving a non-CPE product – such as typewriters or any other unregulated product or service – should be deemed to be the 'tariffing' of that product."[13] AT&T also argues that the contention that its proposed promotion would result in an improper cross-subsidization of unregulated costs is without merit.[14] AT&T also argues strenuously that MCI and US Sprint do indeed provide free equipment to promote their competitive services.[15]

B. *Violation of Sections 201 - 203 of the Communications Act*

6. MCI, US Sprint, and IDCMA also argue that AT&T's proposed promotion violates Sections 201-203 of the Communications Act, 47 U.S.C. §§ 201-203. MCI contends that the AT&T promotion is unreasonably discriminatory, in violation of Section 202(a) of the Act, and constitutes an unjust practice, in violation of Section 201(b) of the Act, because it is limited to customers that commit to take the service for an extended term. MCI argues that the customer's service term should be irrelevant because the equipment would be returned to AT&T when the customer discontinues service.[16]

7. IDCMA argues that the proposed promotion violates Section 201(b) of the Act because it constitutes a tying arrangement.[17] IDCMA also contends that by giving away certain kinds of CPE, AT&T can position itself to gain the rest of a customer's CPE business through the establishment of *de facto* equipment compatibility standards and through the expansion of the sales and service relationship created by the CPE gift.[18] In addition, IDCMA asserts, AT&T's proposed tariff revisions will result in unlawful rate discrimination among similarly situated customers using like services. IDCMA observes that customers taking the promotion will in effect have their rates for transmission services reduced by the value of the free CPE, which IDCMA argues constitutes an unreasonable discrimination.[19] Finally, IDCMA argues that the free provision of unregulated CPE as an inducement for customers to purchase a carrier's tariffed services constitutes an unlawful rebate under Section 203(c) of the Act.[20]

8. AT&T asserts that the petitioners' challenges to its promotion under Section 201-203 of the Act are legally without merit. First, AT&T states, its proposed promotion is not an improper tying arrangement because AT&T lacks the type of control over the equipment market that would allow it to force equipment customers to purchase AT&T's tariffed services. AT&T also contends that the promotion would be generally available to all similarly situated customers, thus foreclosing any claim of unreasonable discrimination. Moreover, AT&T asserts that the prohibition on rebates contained in Section 203(c) of the Act does not limit a carrier's discretion to select particular tariff structures, but simply requires that all payments between the carrier and the customer be as specified in the tariff.[21] Finally, AT&T argues that the economic support material submitted with the captioned transmittal complies fully with the Commission's Rules.[22]

III. DISCUSSION

9. We conclude that AT&T's proposal to furnish customers with unregulated CPE free of charge as an inducement to purchase regulated tariffed transmission services violates the Commission's *Computer II* Rules. We therefore reject the captioned transmittal as patently unlawful.[23]

10. As petitioners have observed, the Rules clearly state that[24] the carrier provision of customer-premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from the provision of common carrier communications services and not offered on a tariffed basis.

The Commission adopted this requirement for several reasons. First, the Commission noted that bundling of equipment and service charges may restrict the freedom of choice of consumers to assemble the package of equipment and services they most desired.[25] The Commission also concluded that bundling equipment and service charges produces distortions in interstate rates which would be difficult to remedy without unbundling.[26] Finally, the Commission observed that, in a regulated market, bundling makes the development of a non-discriminatory, cost-based rate structure more difficult.[27]

11. AT&T makes no argument that would allow us to conclude that it does not propose to provide CPE together with regulated transmission services in direct contravention of the above-quoted rule. Rather, AT&T argues that it does not propose to tariff CPE, but merely to reference CPE in its tariff and that because it is not, in its view, tariffing CPE, it cannot bundle CPE and transmission services.

12. The cases that AT&T cites do not suggest that its proposed promotion would be permissible under this rule, nor does AT&T claim that they do. Rather, AT&T asserts that case law confirms that the inclusion of CPE in its tariff does not constitute tariffing CPE. Scrutiny of the cases cited by AT&T, however, demonstrates that they do not support this proposition. For example, AT&T states that "in *Aloha Airlines v. CAB*, 598 F.2d 250, 259 (D.C. Cir. 1979), the Court referred to unregulated activities, such as the provision of meals, drinks, and in-flight movies, offered by airlines in connection with their regulated air transportation services as 'promotional devices.'"[28] While this is true, it is also irrelevant.[29] That AT&T's proposal to give away CPE is a "promotional device" is undisputed. The issue is whether this promotional device contravenes the Commission's Rules.

13. Similarly, *Western Union Telegraph Company, (Western Union)* Mimeo No. 3310, released Apr. 4, 1984 (Com.Car.Bur.), lends no support to AT&T's argument that the inclusion of a promotional product in its tariff does not amount to tariffing that product. To the contrary, the Bureau held in that Order that the gifts did not constitute a rebate because "the specific gifts provided under the program are specified in the tariff. Thus, they are, in effect, an element of the tariff rate just as a promotional monetary discount provided for under tariff would be."[30] It is difficult to conclude that what is, "in effect, an element of the tariff rate" is at the same time not tariffed. AT&T's proposed promotion constitutes the forbidden tariffing and bundling of unregulated CPE with regulated transmission services. AT&T's filing must therefore be rejected.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1568, IS REJECTED.

15. IT IS FURTHER ORDERED that the petitions to reject filed by MCI Telecommunications Corporation, the Independent Data Communications Manufacturers Association, Inc., the North American Telecommunications Association, and US Sprint Communications Company Limited Partnership ARE GRANTED.

16. IT IS FURTHER ORDERED that the motion for acceptance of late filed pleadiing filed by MCI Telecommunications Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T proposes to limit the Megacom and Megacom 800 promotions to customers that subscribe for specified service terms. *See* AT&T Tr. No. 1568, Tariff F.C.C. No. 1, Section 8.1.1.O & Tariff F.C.C. No. 2, Section 8.1.1.E.

[2] Alternatively, AT&T states, it would reimburse customers for all installation and usage charges associated with such equipment. AT&T Tr. No. 1568, Description and Justification (D&J) at 1. The specific equipment that AT&T proposes to provide would, depending on the particular customer's circumstances, include D4 channel banks, channel service units (CSUs), channel cards, D5 channel banks, control bays, and necessary software, or DS1 circuit cards. *Id.* at 6 n.**.

[3] *Id.* at 2-3.

[4] MCI's petition was filed on April 26, 1989, one day after the date for filing petitions to reject or suspend the captioned tariff transmittals. In an accompanying motion for acceptance of late filed pleading, MCI states that its tardiness was due to an unanticipated delay in preparing an affidavit supporting its peti-

tion. The motion is unopposed. We grant MCI's motion because we believe that the public interest would be served by considering the arguments presented in its petition.

[5] On April 28, 1989, the Alternative Carrier Telecommunications Association (ACTA) filed a letter expressing its support for US Sprint's petition.

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), *Final Decision*, 77 FCC 2d 384, *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.* FCC No. 84-190, released May 4, 1984.

[7] NATA Petition To Reject (NATA Petition) at 4-6.

[8] *Id.* at 6-7.

[9] *Id.* at 8-9.

[10] US Sprint Petition To Reject or Alternatively Suspend and Investigate (US Sprint Petition) at 3-8; IDCMA Petition To Reject (IDCMA Petition) at 2-5.

[11] US Sprint Petition at 6-8 and Attachment (Affidavit of Mark D. Heckendorn); MCI Petition at 2-4 and Attachment (Affidavit of Barbara Brewer).

[12] Reply of American Telephone and Telegraph Company (AT&T Reply) at 5-7.

[13] *Id.* at 8. AT&T contends that merely "referencing" in its tariff promotional practices which affect tariffed service rates does not constitute tariffing. AT&T concludes that, because it is not tariffing CPE, it is not bundling CPE with transmission services. *Id.* at 8-9.

[14] *Id.* at 9.

[15] *Id.* at 18-20 and Apps. 1 & 2.

[16] MCI Petition at 5-6. *See also* US Sprint Petition at 3.

[17] IDCMA Petition at 7-9. IDCMA analogizes this practice to AT&T's Hospitality Network Service (HNS) filed under Transmittal No. 1046. AT&T withdrew that transmittal after this Bureau instituted an investigation to examine, *inter alia*, whether "the 'tie-in' of '1+' rates and '0+' commissions . . . constitute[d] an 'unreasonable practice' that violates Section 201(b)" of the Act. AT&T Communications, 3 FCC Rcd 1465 (Com.Car.Bur. 1988). After AT&T withdrew the proposed tariff revisions, we terminated the investigation. AT&T Communications, 3 FCC Rcd 3961 (Com.Car.Bur. 1988).

[18] IDCMA Petition at 9.

[19] *Id.* at 10-11.

[20] *Id.* at 5-7. MCI and US Sprint raise several other arguments as well. Both petitioners contend that AT&T's demand and revenue forecasts are unreliable. MCI Petition at 4-5; US Sprint Petition at 9-12. US Sprint also argues that the expenses of the proposed promotion are improperly reflected, while MCI complains that the value of the equipment is unknown. US Sprint Petition at 12-13; MCI Petition at 6.

[21] AT&T Reply at 11-16.

[22] *Id.* at 16-21.

[23] Rejection is required when a tariff is *prima facie* unlawful in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation, or Order. *See, e.g., American Broadcasting Companies Inc. v. FCC,* 663 F.2d 133 (D.C. Cir. 1980).

[24] 47 C.F.R. § 64.702(e).

[25] *Computer II Final Decision,* 77 FCC 2d 384 at 442-43.

[26] *Id.* at 444-45.

[27] *Id.* at 445-47.

[28] AT&T Reply at 7-8.

[29] In fact, the Court was merely restating Aloha's argument in referring to such in-flight amenities as promotional devices. *See* 598 F.2d at 259.

[30] *Western Union,* at para. 4. This would appear to support AT&T's further argument that its proposed promotion would not constitute an unlawful rebate. We need not reach this question, however, because we reject AT&T's transmittal on the grounds that it violates Section 64.702 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — Transmittal No. 723

Tariff F.C.C. No. 103

Annual Contract
Video Service

ORDER

Adopted: June 8, 1989; Released: June 9, 1989

By the Chief, Common Carrier Bureau:

1. On April 10, 1989, Brightstar Communications Ltd. (Brightstar) filed a petition to reject or, in the alternative, to suspend and investigate the above-captioned transmittal. Transmital 723 was filed by Communications Satellite Corporation (Comsat) on March 24, 1989, to amend a previously filed transmittal which took effect on January 17, 1989.[1] Comsat filed a reply to Brightstar's petition on April 28, 1989. Subsequently, numerous pleadings and letters were filed in this proceeding, including comments in support of Brightstar's petition filed by Pan American Satellite (PAS) on April 28, 1989, a response to Comsat's reply by Brightstar on April 28, 1989, a letter by Comsat on May 10, 1989, and a letter in response to Comsat's May 10 letter by PAS on May 18, 1989, and by Brightstar on May 22, 1989. Transmittal 723 is scheduled to become effective on June 10, 1989.

2. The genesis of this proceeding is a tariff revision filed by Comsat on November 3, 1988.[2] By Transmittal 712, Comsat proposed to provide video offerings in the Atlantic and Pacific Ocean Regions to complement its existing offerings, but using non-standard capacity on Transponder 86. The capacity is preemptible if needed to restore TAT-8 service. Comsat filed Transmittal 723 to improve its ability to attract customers for the video service established by Transmittal 712. Transmittal 723 proposes a three month promotional period in which customers may order Comsat's video service under terms that are more liberal than those established in Transmittal 712. Transmittal 723 would not, however, change the existing 45 percent discount from similar services offered on standard transponders.

3. Brightstar asserts that Comsat's role in a consortium of International Telecommunications Satellite Organization (Intelsat) signatories providing video service is contrary to the public interest. Brightstar Petition at 7-13. Brightstar argues that Comsat is engaging in anticompetitive behavior by associating itself with foreign interests which have demonstrated their intention to compete unfairly with Comsat's customers, among them Brightstar. *Id.* at 9.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection and that no question has been presented that warrants investigation at this time.[3]

5. IT IS THEREFORE ORDERED that the petition to reject or, in the alternative, to suspend and investigate filed by Brightstar Communications Ltd. in response to Communications Satellite Corporation Tariff F.C.C. No. 103, Transmittal No. 723, IS DENIED.

6. IT IS FURTHER ORDERED that the letters and comments filed in response to Comsat's reply to Brightstar's petition ARE DISMISSED as unauthorized pleadings in violation of Section 1.45(c) of the Commission's Rules, 47 C.F.R. § 1.45(c).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Communications Satellite Corporation, Transmittal No. 712, 4 FCC Rcd 685 (Com.Car.Bur. 1989).

[2] *See* Comsat, Tariff F.C.C. No. 103, Transmittal 712, filed Nov. 3, 1988.

[3] In the event TAT-8 restoration is moved from Transponder 86, or Transponder 86 customers are moved to another satellite if preempted, the nature of the customer risk justifying the 45 percent discount could be materially affected. We would expect Comsat, in such a case, to file a new transmittal with proposed rate revisions reflecting changes in the degree of risk associated with service provided through the use of Transponder 86.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

NATIONAL ASSOCIATION
FOR BETTER BROADCASTING

against

TELEVISION STATION KCOP(TV)
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1989; Released: June 2, 1989

By the Commission:

1. The action taken herein responds to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *National Association for Better Broadcasting v. FCC*, 830 F. 2d 270 (D.C. Cir. 1987), which remanded to the Commission its decision in *National Association for Better Broadcasting v. KCOP Television*, 58 RR 2d 61 (1985). At issue is the proper application of the sponsorship identification requirements of Section 317 of the Communications Act to the broadcast of a barter program, *He - Man and the Masters of the Universe*.

BACKGROUND

2. *The "He-Man" Broadcasts*. KCOP Television, Inc., licensee of television station KCOP, channel 13, Los Angeles, California, has broadcast episodes of the program *He-Man and the Masters of the Universe* over a period of years dating back to September of 1983. The program is acquired from Group W Productions, the syndicator of the program, in exchange for two minutes of commercial air time given to Group W. Group W in turn makes one of these minutes available to Mattel, Inc., a toy manufacturer, pursuant to an independent agreement between Group W and Mattel. The air time provided to Mattel is run in thirty-second segments on a rotation basis throughout KCOP's children's program schedule, with no commercial for Mattel's "He-Man" products appearing in or around the "He-Man" program.

3. The program, an animated cartoon series for children, is a production of Filmation Associates, Inc., a subsidiary of Group W Productions in partnership with Mattel, Inc. At the time the complaint in this proceeding was filed, it was the top ranked syndicated children's program nationally in terms of audience ratings. Approximately $14 million was spent for the production of the first 65 episodes of the series and it has been syndicated by Group W to at least 142 stations. KCOP is obliged under its contract for the program to air 65 original episodes of the program and six reruns (for a total of 455 broadcasts) over a period of 91 weeks. KCOP values the two minutes of time bartered in exchange for the program as worth $300,000 per year at the time of contracting or approximately $1154 per half hour of programming (barter value for 91 weeks = $525,000 divided by 455 broadcasts).

4. Mattel is the creator and manufacturer of a line of "He-Man" toys and some twenty of these are paralleled by characters or features in the "He-Man" program. Some of the principal characters in the program were created by Filmation for the program and subsequently developed as toys. According to KCOP, over one hundred animated characters appearing in one or more episodes have not been developed as toys. The basic characters, however, were created and developed by Mattel as the He-Man toy product line and the screen credits within the programs affirm that the trade-marked characters are Mattel properties used with the permission of Mattel.

5. *The NABB Complaint*. On June 22, 1984, the National Association for Better Broadcasting, which identifies itself as a California based non-profit educational corporation founded to promote and support high standards of radio and television service, filed a complaint with the Commission alleging that KCOP, in broadcasting the "He-Man" programs was violating Section 317 of the Communications Act by not identifying "Mattel/Westinghouse" as the sponsor of the program.

6. Section 317 provides in relevant part:

> (a)(1) All matter broadcast by any radio station for which any money, service or valuable consideration is directly or indirectly paid, or promised to or charged or accepted by the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, that "service or other valuable consideration" shall not include any service or property furnished without charge or at nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the same broadcast.

NABB characterized the show as a virtual non-stop depiction of the "He-Man" logo and of "He-Man" toy products. "The issue on which the FCC is required to rule," NABB stated, "is whether or not, in the Commission's judgment, the program, as aired by KCOP, is comprised substantially, or even in any part of commercial matter."

7. *Commission decision*. Ruling on the NABB complaint, and a separate complaint relating to other matters filed by Action for Children's Television, the Commission addressed the question of the commercial content of the program and concluded that the broadcaster involved had made a good faith determination that the program possessed significant entertainment value for child audiences and that it could see "no useful purpose in restricting unnecessarily presentations of programs merely because products are depicted therein." It further concluded that complaints had not demonstrated any violation of the sponsorship identification provisions of the rules or statute, the policies contained in the 1974 Children's Television Policy Statement, or other Commission policies.

8. *Court of Appeals Decision.* On appeal, the court addressed two separate issues. First, the Commission's decision appeared to conclude that the sponsorship identification provisions of Section 317 applied only to broadcasts that were purely commercial in content. The court found this conclusion to be clearly an incorrect reading of the statute. It accordingly remanded the case back to the Commission.

9. Second, the court, addressing the issues of sponsorship identification in connection with barter programming generally, stated, "Given the prevalence of barter arrangements for children's programs, we think it necessary for the Commission to devise a workable and legally supportable standard by which it may be ascertained whether such arrangements are so balanced in benefits to program producers and broadcasters, respectively, as to involve exchanges immunized from the requirement of sponsorship identification imposed by Section 317(a)(1)." [Footnote omitted.] 830 F.2d at 278. The court also noted in its discussion, that sponsorship identifications may be required for programming supplied to a station free or for a nominal charge if the program contains a product identification "beyond an identification which is reasonably related to the use of such service or property on the broadcast."

10. *Comments.* In order to assist the Commission in complying with the court's manadate, the Commission issued an *Order*[1] requesting the views of the parties in this case on the proper import the court's decision should be given in the instant proceeding and on what further agency action should be taken. In response, both NABB and KCOP-TV submitted comments. The two parties differed in their interpretation of the significance of the court's ruling in the instant case. NABB contended that the court's decision supported its initial claim that KCOP-TV violated Section 317 by airing the "He-Man" program without identifying Group W as the supplier of the show.[2] NABB felt that, since the court decided the issues in its favor, there was no need for reconsideration of those same issues.[3] On the other hand, KCOP-TV claimed that the court's decision did not reach the issue of whether Section 317 was violated when the "He-Man" program was broadcast without sponsorship identification by KCOP-TV. In its view, the court simply held that Section 317 applies to broadcasts of all matter, not merely commercial matter as the Commission had mistakenly believed.[4]

11. On the issue of what standard the Commission should apply to barter arrangements in determining when the sponsorship identification requirement of Section 317 is triggered, the two parties provided little discussion. NABB proposed that whatever standard the Commission adopts should include a sponsorship identification requirement for all children's programs like "He-Man" which are based on a line of toys and are supplied to the stations under a barter arrangement. KCOP-TV, on the other hand, recommended that Section 317 should not be triggered whenever the barter arrangement under which the program was obtained reflects a *bona fide*, arms length transaction. Under this test, KCOP-TV contended that, because it traded commercial time of substantial value in return for the "He-Man" programs, the transaction was, indeed, a legitimate transaction and, therefore, no sponsorship identification was required under Section 317.[5]

DISCUSSION

12. As stated above, the Court of Appeals for the District of Columbia Circuit remanded the Commission's decision in *NABB v. KCOP* to us for further proceedings consistent with its opinion. At the outset, we acknowledge that, to the extent our decision appeared to conclude that the sponsorship identification provisions of Section 317 applied only to broadcasts that were purely commercial in content, this was incorrect. Indeed, the Commission has consistently held that, "The Act by its terms applies without distinction to commercial or program material," *Teaser Announcements*, 40 FCC 60 (1959), and this is the interpretation that will be followed in the future.[6]

13. With that matter corrected, we turn next to the court's instruction that we devise a standard "by which it may be ascertained whether such [barter] arrangements are so balanced in benefits to program producers and broadcasters, respectively, as to involve exchanges immunized for the requirement of sponsorship identification . . . "

14. No one disputes that KCOP exchanged valuable broadcast advertising time in return for the program. Moreover, there is no claim here that Group W gave consideration to KCOP in addition to supplying the program. The concern is solely that the value of what KCOP exchanged for the programming might have been less than the program's worth. Stated another way, the consideration KCOP allegedly received for broadcasting these programs was receipt of the programs themselves at a discounted price. Our analysis, therefore, must focus on the circumstances in which Section 317, as qualified by the proviso, contemplates, absent a waiver, the broadcast of a sponsorship identification where a broadcaster purchases programming at a price that might not fully reflect the program's worth to the broadcaster. We note that prior to adoption of the proviso in 1960, the Commission would not have applied a sponsorship identification requirement in the type of case just described except when the broadcaster received the program for free or at a nominal charge. *See Public Notice, Sponsorship Identification of Broadcast Material*, 40 FCC 69, 71 (1960). As discussed below, examination of the proviso, its legislative history, and the general statutory policies underlying Section 317 support our view that Congress intended that the Commission continue to impose an identification requirement where nothing but programming is provided to a broadcaster only in the limited circumstances involving free programming or nominal payments for programming that are outlined in the proviso to Section 317.

15. The proviso was enacted in 1960 in response to broadcasters' complaints that the Commission had recently been requiring a sponsorship identification in every case in which the broadcaster was given free, or at nominal charge, programs, products or services to be used on the air. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 19 (1960). The House Report explained that the purpose of the proviso was to avoid some of the hardships resulting from the Commission's new interpretation of Section 317[7] by establishing "a general rule that an announcement shall not be required under Section 317 with respect to any service or property 'furnished [for broadcast] without charge or at a nominal charge,'" unless the circumstances were within the exception spelled out in the proviso. *Id.* at 20. In short, the purpose of adding the proviso was to *limit* the scope of cases requiring a sponsorship identification under Section 317.

16. As mentioned above, when Congress adopted the proviso, it had no reason to believe that the Commission would find that a sponsorship identification under Section 317 was necessary when the licensee paid more than a nominal charge, but nevertheless the charge allegedly was less than the fair market price of the program. There is also no indication whatever that Congress disagreed with the Commission's administration of Section 317 in this regard and sought, through the proviso, to impose an identification requirement under Section 317 in situations where the Commission had not previously found such an identification to be necessary. On the contrary, to the extent that the adoption of the proviso reflected a disagreement between Congress and the Commission as to when an identification under Section 317 was necessary, Congress was concerned that the Commission had required such an identification in cases where Congress did not believe that this was necessary. More specifically, Congress did not believe sponsorship identifications were necessary when broadcasters received broadcast programming or services for free or at nominal rates except when the circumstances fell within the terms of the proviso.[8] Congress thus sought to limit the Commission's authority by exempting from the identification requirement some of the situations for which an announcement would have been required under the Commission's earlier interpretation of Section 317. *See id.* In sum, an expansive interpretation of Section 317 that applies its provisions to discounted programming (*i.e.*, payment of more than nominal value) would be a novel interpretation of the statutory provision and would significantly broaden the type of situations in which a sponsorship identification could be required, with no indication whatever that Congress intended such a result. As discussed below, the general policies that Section 317 are intended to address also do not support such a broad interpretation here.

17. When the Commission first applied the sponsorship identification requirement to free, or nearly free, programming, it noted that the purpose of Section 317 was "to prevent deception growing out of concealment of the fact that the broadcast of a particular program material was induced by consideration received by the licensee." *Public Notice*, *supra*, 40 FCC 69, 70. At that time, and before enactment of the proviso, the Commission interpreted Section 317 as applying to materials furnished for free or at nominal rates because it believed that receipt of program materials in such circumstances had the "practical effect" of being an inducement to air the materials. *Id.* The Commission further assumed that, when program materials are furnished free, or nearly free, the supplier's objective is principally to promote the material furnished. *Id.*

18. The factors which led the Commission to apply the sponsorship identification requirement to free, or nearly free, programming simply do not apply to other program materials that are sold in a commercial setting. For example, program suppliers frequently offer discounts for a variety of business reasons that are not associated with any intent to promote the material furnished. Thus, interpreting Section 317 to apply a sponsorship identification requirement to *all* cases involving program discounts appears to be overly expansive because it would bring within the statutory provisions many cases in which the discount offered by the programmer is no more than a bona fide business decision that is wholly unrelated to any desire to promote a particular product or message. Furthermore, in circumstances where a broadcaster's payment for programming is more than nominal, it can be assumed that the broadcaster has significant independent motivation to air the material. Thus, programming for which a broadcaster merely receives a price discount implicates the concerns underlying the basic sponsorship identification requirement far less than programming offered for free or at nominal rates. Only in the latter circumstances is it likely that the broadcaster's decision to air is promoted exclusively by the benefit bestowed upon him by the program supplier and that the supplier's motivation is based mainly on a desire to promote a product or message. Accordingly, the policy considerations which originally led the Commission to apply sponsorship identification requirements to materials received free or at nominal charge do not apply with the same force to other program materials that are sold for use on the air.

19. In light of the foregoing, it appears that achieving the basic statutory purpose underlying the sponsorship identification requirement is satisfied by limiting our inquiry to cases involving nominal payments and by not attempting to extend the reach of the statute to all cases of "discounted" payments.[9] Neither the Commission nor Congress has suggested previously that mere program discounts inherently raise sponsorship identification concerns, and, as discussed above, in a commercial setting program discounts may be readily distinguished from cases involving free programming or programming that is supplied for a nominal payment.

20. We note further that our conclusion to limit our inquiries to cases of nominal payment has practical ramifications that lend further support to our decision. We can see no generally applicable methodology that would allow simple program price comparisons to be used to ascertain the presence of a discount sufficient to trigger examination of a transaction under the proviso. Some consideration of the determinants of program prices may be helpful in explaining the basis for this conclusion.

21. Price will depend on whether the program is purchased singly or as part of a series, whether it involves live action or animation, the particular actors used, what rights are included in the purchase concerning such matters as time of broadcast, number of broadcasts, duration of the contract, particular area of exclusivity garnered against other broadcasters and other media, promotional obligations, legal responsibilities in case of problems, and adjustment for future changes in costs and prices. Similarly, other factors such as when the program will be shown, adjacent programs on the same station and programs to be shown at the same time on competing stations, projected audience size and their demographics will all affect the amount that may be paid for the program. In addition, the amount paid will obviously depend on the bargaining positions and bargaining skills of the parties. The value of the commercial minutes will vary according to the time of day and particular days on which the commercials will be shown, the shows with which they are associated, and the audiences and demographics of the audience likely to view the program.

22. Any direct comparison between cash purchases and barter acquisitions will also be skewed by considerations related to both the risk of program failure and the time value of money. Under barter arrangements, the station avoids a large up-front cash outlay, which is obviously beneficial to the station, but may be obligated to continue

broadcasting the program in question even if it is not successful in terms of audience ratings, which could be very detrimental to the station. Further, particular barter programs may be valued more or less highly depending upon whether the value of the advertising included is regarded as likely to be added to or subtracted from the pool of advertising revenues that would otherwise be available to the station. The timing of the sale in terms of its national distribution could be of critical importance in terms of establishing the program as one which is likely to be widely accepted in the barter market and thus necessary to establish sales momentum or whether the sale is necessary to help the program finally reach a required percentage of the national television market.

23. In addition to the many complex variables involved, much of the relevant information concerning amounts paid for programming is likely to be regarded as proprietary, and thus is not likely to be available for use by stations in the sponsorship identification decision making process. Thus, broadcasters may not know whether the price they pay for programming is less than that paid by others. To the extent such information is made available to the Commission after the fact, we also note that its disclosure in Commission proceedings may result in serious harm to the bargaining position of program suppliers by revealing to prospective purchasers the terms and conditions of other sales. Finally, the complexity of this area is such that, even after close scrutiny of many of the factors involved in a particular transaction, it still may not be clear why, for example, one program is bartered for two minutes of advertising time and another is bartered for ten minutes, due to the interplay of the many factors potentially affecting the agreement, some of which we cannot properly evaluate or of which we may not be aware. Thus, in the end, we may not be in a position to accurately judge which programs are offered at comparable value and which are not.

24. In light of the foregoing, we conclude the Commission should not adopt an expansive interpretation of Section 317 that requires us to engage in a detailed review of the adequacy of a broadcaster's payment in every case in which a program discount is alleged. Such an approach appears to go beyond what Congress intended, is unlikely to yield conclusive results, and could require disclosures that cause substantial competitive harm to program suppliers.[10] Rather, we conclude that the proviso should not be invoked absent a threshold showing that the case clearly involves a nominal payment, as that term is usually understood. Webster's Third New International Dictionary defines "nominal" in relation to a price or consideration as "being so small, slight, or negligible as scarcely to be entitled to the name." Similarly, the Random House Dictionary of the English Language defines nominal payment as "being named as a mere matter of form, being trifling in comparison with the actual value." Although the concept of nominal payment may involve estimations of "comparative" value, in cases where payment is truly "nominal," or "trifling in comparison" to a program's value, we think complainants should have little difficulty in convincingly making that showing.

25. Applying those principles here, we note that NABB expressly alleges that the consideration paid to Group W by Station KCOP-TV was "token." In absolute terms, of course, Group W extracted significant value from the station in exchange for the "He-Man" Show. KCOP-TV was required to give two minutes of advertising time to Group W, and KCOP provides evidence that at the time the barter arrangement was entered into, the advertising time had a value of over $300,000 per year. Accordingly, this is not a case in which the consideration may be classified as "nominal" on its face. Therefore, in order to establish that payment was nominal, it must be shown that the value of the program greatly exceeded the price paid for it. In an attempt to make this showing, NABB compares the value of the program with the expenses incurred in producing it. We do not believe this sort of comparison is the proper measurement of whether the payment made by KCOP was "token" or nominal, for neither KCOP nor any other purchaser would be likely to pay the entire cost of producing a widely distributed program. Furthermore, there are no special circumstances in this case suggesting that KCOP would have wanted to broadcast the "He-Man" program only if it could be purchased at a token or nominal rate. Indeed, NABB recognizes that at the time of the transaction, the "He-Man" show was one of the most highly rated children's television programs. Accordingly, in these circumstances, we have no basis for concluding that the payment made by KCOP for the program was nominal, or indeed, that Group W did not extract from KCOP the full, fair market value of the program.

26. Based on the foregoing, we conclude that station KCOP did not purchase the program in question for only a nominal fee. Accordingly, the sponsorship identification requirements in the proviso to Section 317 were not triggered. In light of this conclusion, it is unnecessary to decide whether KCOP's barter transaction might also have been exempted from any sponsorship identification requirement under other parts of the proviso, and we intimate no view on that question.[11]

27. Accordingly, IT IS ORDERED that the complaint filed by the National Association for Better Broadcasting is DENIED.

28. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 2 FCC Rcd 7084 (1987).

[2] Comments of NABB at 3.

[3] NABB also believes that the Commission should assess sanctions against station KCOP-TV for violations of Section 317 of the Communications Act. In view of our discussion at paras. 12-28, *infra*, denying NABB's complaint, no sanctions will be assessed against KCOP-TV in this proceeding.

[4] Comments of KCOP-TV at 8.

[5] *Id.* at 12.

[6] The Commission's lack of clear focus in this proceeding resulted in part from its misinterpreting the gravamen of the complaint as a more general concern with the commercial content of this program and other Commission policies, including the contention in NABB's complaint (p. 13) that the pro-

gram was "nothing more than a program-length commercial" and that the station had broadcast "He-Man" "without identifying the program itself as a commercial." (attachment to complaint.) Nothing herein or in the court's decision puts in issue our conclusions with respect to compliance with these other policies.

[7] The House Report observed that, although Section 317 in its original form had been enacted in 1927, "up to this point [it] had never been so interpreted by the Commission." *See id.* at 19.

[8] Programming furnished for use on the air is encompassed within the types of "property" covered by the proviso. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 24, Example 26(a) (scenic travel film furnished for use by broadcast stations).

[9] Had we concluded that the existence of a discounted price, even though the price was more than nominal, was enough to bring Section 317 into play, we believe that the ultimate conclusion as to whether a Section 317 identification is necessary would depend upon whether the test set forth in the proviso was met. That test looks to whether the program was "furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast." While we acknowledge that the test set forth in the proviso is literally reserved for cases where the program is furnished "without charge or at a nominal charge," if Section 317 should be interpreted to reach discounted programs, absurd results could follow unless those programs are analyzed under the test set forth in the proviso. Specifically, a sponsorship identification could be required when programming is offered to a broadcaster at a discounted charge (but one that is more than nominal) even though it might well be that, under the language of the proviso, no identification would be necessary had the broadcaster succeeded in limiting his payment to a nominal charge. We can see no reasonable basis for Congress to have intended such a result.

[10] As indicated above, we do not interpret the statute as mandating application of a sponsorship identification requirement to cases involving program discounts. We also note that the Commission is empowered to waive the statutory sponsorship identification requirement in appropriate cases. *See* 47 U.S.C. § 317(d). Even if the statute were interpreted to require sponsorship identification under the proviso (or indeed, under the main body of section 317) where a broadcaster's payment is more than nominal, we believe the countervailing policy and practical considerations discussed above would support waiver of the requirement.

[11] In our proceeding examining commercialization practices on children's television, we indicated that we would treat herein two petitions filed by Action for Children's Television ("ACT") on January 17, 1986, and October 5, 1987, respectively. *See Further Notice of Proposed Rule Making / Notice of Inquiry* in MM Docket No. 83-670, 2 FCC Rcd 6822, 6828 n. 22 (1987). In the first petition, ACT asks the Commission to impose sponsorship identification obligations on broadcasters airing so-called program-length commercials, and, in the second, it proposes such obligations with respect to programs designed to be viewed with interactive toys. On further reflection, we have decided to restrict the scope of this decision to the particular case on remand from the court and to defer disposition of the ACT petitions until another time.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125,
Phase I

In the Matter of

Annual 1985 Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1989; Released: June 6, 1989

By the Commission:

I. PRIOR ORDERS

1. The Common Carrier Bureau issued an order in this proceeding on October 5, 1988, which disallowed 1985-86 Ohio Bell Telephone Company (Ohio Bell) access expenses in the amount of $9.1 million and access investment in the amount of $28.7 million.[1] We granted in part a petition for reconsideration filed by the Ameritech Operating Companies (Ameritech) on behalf of Ohio Bell.[2] We found that most of the discrepancies in jurisdictional separations factors used in the development of state and interstate rates were attributable to timing differences. We said "Such timing differences do not, however, explain Ohio Bell's decision to include Shared Network Facility Arrangement (SNFA) investment and expense in the development of separations factors that were used to compute state rates and to exclude that investment and expense in the development of separations factors that were used to compute interstate rates."[3]

2. We concluded that Ohio Bell erred by using inconsistent separations methods and rejected Ameritech's contention that it was entitled to exclude SNFA investment and expense from the computation of separations factors Ohio Bell used to compute interstate access rates. We said: "Even if Section 67.2(d) [former 47 C.F.R. §67.2(d)] could be construed to permit a carrier to elect to exclude SNFA investment and expense for that purpose, Ohio Bell must be deemed to have made its election when it included SNFA investment and expense in developing the separations factors Ohio Bell used to compute state rates."[4] We interpreted Ameritech's reconsideration petition to mean that inclusion of SNFA investment and expense in the development of Ohio Bell separations factors would have reduced projected interstate access expense by $3.014 million and would have reduced projected interstate net investment by $12.953 million. We reduced the disallowance to those amounts.

II. FURTHER RECONSIDERATION PETITION

3. On March 8, 1989, Ameritech filed a petition for further reconsideration. No oppositions have been filed and no pleadings have been filed supporting Ameritech's contentions.

4. Ameritech states that its Ohio rate development process did not rely directly on separations factors as such. Ameritech describes its rate development process as relying on "allocation factors" that are not "true" Part 67 (now Part 36) separations factors but instead are allocative factors developed and applied in the ratemaking process. The subsequent, more rigorous application of separations procedures to actual revenues, Ameritech contends, precluded any double recovery that appeared possible from comparing the conceded inconsistencies in its revenue requirements developed for ratemaking purposes.

5. In the ratemaking process used in Ohio, Ameritech asserts, it developed the state allocation factor by deducting "interstate amounts," taken from separations records, from total company operations. The remainder, expressed as a proportion of total company operations, is considered a state amount for purposes of the Ohio ratemaking process, and is used to develop the state revenue requirement. The state amount includes SNFA costs. The relation between state and overall revenues developed for this purpose, however, does not purport to duplicate application of the separations process.

6. In developing its interstate rates, Ameritech states, it followed a different procedure in which total company figures used to develop the interstate revenue requirement excluded SNFA amounts at the outset.[5] As a consequence, the methodologies used to develop the revenue requirements for the two jurisdictions were not identical. Ameritech argues, however, that its ratemaking process in both jurisdictions used consistent separations data, and that the differences between methods used in the state and interstate jurisdictions to develop the respective revenue requirements would not result in an overrecovery in either jurisdiction.

III. DISCUSSION

7. Ameritech's most recent description of the ratemaking methods Ohio Bell used to develop state rates demonstrates that the disallowances we adopted in the *February 3 Order* do not reflect the effect of the computation of separations factors that Ohio Bell used to compute interstate access rates. The explanations Ameritech provided in the further reconsideration petition and in *ex parte* presentations indicate that the methodology Ohio Bell used to develop its intrastate revenue requirement did not affect interstate rates. We have accordingly decided that the petition for further reconsideration should be granted to the extent that Ameritech asks us to vacate the disallowances and the refund requirements.

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the Ameritech Operating Companies IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 1453 (*October 5 Order*).

[2] Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, FCC 89-31, released Feb. 3, 1989 (*February 3 Order*).

[3] *Id.* at para. 8.

[4] *Id.* at para. 11.

[5] Ameritech states that the interstate amounts used for rate development were initially developed by the Separations Information System (SIS) program, which automatically excluded SNFA amounts and, further, precluded allocations of more than 100 percent of any amount.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-371

In re Applications of

BREAUX BRIDGE BROADCASTERS, LIMITED PARTNERSHIP	File No. BPH-851115MY
ATCHAFALAYA BROADCASTING COMPANY, INC.	File No. BPH-851115NJ
J.B.C., INC.	File No. BPH-851115NL

For a Construction Permit for
a New FM Station on Channel 243A
in Breaux Bridge, Louisiana

ORDER

Adopted: June 8, 1989; Released: June 21, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The record in this case shows that the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann, 4 FCC Rcd 581 (1989), denied the application of Atchafalaya Broadcasting Company, Inc. and that Atchafalaya Broadcasting did not file exceptions as required by the Commission's rules. Section 1.276(f) provides that: "When any party fails to file exceptions within the specified time to an Initial Decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute."

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR 1.276(f), the Application of Atchafalaya Broadcasting Company, Inc. (File No. BPH-851115NJ) IS DISMISSED, with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions from
digital devices.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

ORDER EXTENDING TIME TO FILE COMMENTS

Adopted: June 7, 1989; Released: June 9, 1989

By the Chief Engineer:

1. A Notice of Proposed Rule Making in the above entitled proceeding, FCC 89-53, was adopted by the Commission on February 13, 1989, and released on March 7, 1989. In an Order in this proceeding, approved by the Chief Engineer on April 10, 1989, and released on April 26, 1989, the time for filing comments and reply comments was extended to June 7, 1989, and July 7, 1989, respectively.

2. On May 30, 1989, American Telephone and Telegraph Company ("AT&T") filed with the Commission a petition requesting extension of the times for filing comments and reply comments to July 10, 1989, and September 11, 1989, respectively. In their further petition, AT&T states that it participates in national and international organizations which develop test and measurement standards. The petitioner further states that its technical experts in this area are currently involved in standards development which was planned months before this proceeding was initiated. AT&T asserts that these experts cannot review the test results from the multiple testing locations used by the petitioner, both company owned and independent contractors, and make significant comments on the proposed test procedure in the time presently allotted.

3. Because of the technical information and experience which can be added to this proceeding by AT&T and other companies, as well as our desire to have a fully developed record before us, it has been determined that a further extension of the comment and reply comment dates is appropriate. However, due to our desire to resolve this proceeding as soon as possible, we feel that extending the comment and reply comment periods as requested will prolong this proceeding unnecessarily. We believe that the concerns of all interested parties can still be resolved with a reply comment period of 30 days, instead of the 60 days requested. Accordingly, IT IS ORDERED, pursuant to the delegated authority contained in 47 CFR 0.241(a)(5), that the period of time for the filing of comments in the above proceeding is extended until **July 7, 1989,** and the period of time for filing of reply comments is extended until **August 7, 1989.**

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KFRC) San Francisco, California	**MM DOCKET NO. 84-1098** File No. BR-43
For Renewal of License	
GOLD COAST BROADCASTING, INC. San Francisco, California	**MM DOCKET NO. 84-1099** File No. BP-800930AL
PAUL J. GROWALD San Francisco, California	**MM DOCKET NO. 84-1100** File No. BP-830509AE
SOUTH JERSEY RADIO, INC. Richmond, California	**MM DOCKET NO. 84-1101** File No. BP-830511AG
GOLD MOUNTAIN BROADCASTING CO. San Francisco, California	**MM DOCKET NO. 84-1110** File No. BP-830512BX
COZZIN COMMUNICATION CORPORATION Richmond, California	**MM DOCKET NO. 84-1111** File No. BP-830512BQ
For Construction Permit for a New AM Station	

Appearances

Robert Lewis Thompson, Esquire, on behalf of Gold Coast Broadcasting, Inc.; *Nathaniel F. Emmons, Esquire*, on behalf of Paul J. Growald; *Alfred C. Cordon, Esquire* and *Dennis J. Kelly, Esquire*, on behalf of South Jersey Radio, Inc.; *Irving Gastfreund, Esquire*, on behalf of Gold Mountain Broadcasting Co.; and *Ben C. Fisher, Esquire, Ann K. Ford, Esquire*, and *John K. Hane, Esquire*, on behalf of Cozzin Communication Corporation.

DECISION

Adopted: June 8, 1989; Released: June 22, 1989

By the Review Board: MARINO (CHAIRMAN), BLUMENTHAL, AND ESBENSEN.

Board Member BLUMENTHAL:

INTRODUCTION

1. Before the Review Board is the *Partial Initial Decision*, FCC 86D-49, released August 8, 1986 (hereinafter " *I. D.* ") of Chief Administrative Law Judge Thomas B. Fitzpatrick (hereinafter "ALJ") in the above-captioned case. Exceptions and reply briefs have been filed by the remaining five (of an original thirteen) applicants seeking to replace RKO as the licensee on the subject standard (AM) broadcast frequency.

2. Unlike the pedestrian comparative renewal case, the *I. D.* here is merely "partial" because the Commission has divided thirteen separate comparative renewal proceedings involving the broadcast stations of RKO into two discrete phases: (a) Phase I, which will determine whether RKO is basically qualified to remain a Commission licensee; and (b) if not, which of the competing applicants for the respective RKO broadcast facilities should succeed RKO as the licensee, the various "winners" to be determined in these individual Phase II proceedings. *See RKO General, Inc. (WYFR - FM)*, 100 FCC 2d 462, 467-468 (1985). We deal here with one of the residual Phase II cases, [1] where the Commission only recently ordered:

> the parties seeking review of the [RKO] partial initial decisions to file their exceptions with the Review Board, which regularly considers matters of this nature, within 30 days after the release date of this memorandum opinion and order . . . . After the Board has received exceptions and replies, it shall, with highest priority, proceed to review the ALJ's ranking of the applicants and issue decisions denying those applicants not ranking first.

Memorandum Opinion and Order, 4 FCC Rcd 1532, 1533 (1989).

3. The ("partial") *I. D.* in this particular Phase II proceeding found that Paul J. Growald was the best qualified challenger to succeed RKO, should RKO (as an incumbent renewal applicant) be found not to merit a "renewal expectancy" in Phase I. [2] Because we find that the ALJ erred fatally in his resolution of the basic §307(b) issue, we reverse the *I. D.* and rank in first position South Jersey Radio as the best qualified challenger to the incumbent RKO.

SECTION 307 (b) ISSUE

4. Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), reads as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several

> States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

A qualified applicant for a *community* that is entitled to a statutory preference under §307(b) shall prevail, irrespective of the extraneous virtues of any other competing applicants for a less favored community. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360-362 (1955).

5. Pursuant to our governing statute and the *Allentown Broadcasting* principle, the *Hearing Designation Order*, 49 Fed. Reg. 48989, published December 17, 1984, in this case designated the prosaic §307(b) issue, and its "contingent" comparative sub-issue, to wit:

> To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. As is evident from this case caption, three of our challenging applicants (Gold Coast, Growald, and Gold Mountain) selected RKO's current city of license, San Francisco, as their proposed community, while the two others (South Jersey and Cozzin) both opted for the community of Richmond, California, a sizeable maritime city 16 miles northeast of San Francisco. In contrast to San Francisco, Richmond currently has no commercial broadcast station (AM, FM or TV) licensed to that city. *I. D.*, para 67. But, nonetheless finding that the Richmond applicants were entitled to no §307(b) preference, *see I. D.*, Concls., paras. 2-4, the ALJ moved to the "contingent" comparative sub-issue allowed by the *Hearing Designation Order*, which he resolved in favor of Growald. South Jersey and Cozzin urge, correctly we shall demonstrate, that the ALJ failed in not preferring the Richmond applicants under the preeminent §307(b) issue. [3]

7. We start our §307(b) review with the venerable proposition that:

> Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations.

Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, 1050-1051 (D.C. Cir. 1977) (footnotes & string citations omitted). As we elaborated at length on the three main lines of §307(b) cases in *Debra D. Carrigan*, 100 FCC 2d 721 (Rev. Bd. 1985), *review denied*, 104 FCC 2d 826 (1986), *aff' d by judgment sub nom. Bernstein / Rein Advertising, Inc. v. FCC*, 830 F.2d 1188 (D.C. Cir. 1987):

> the sinews of Section 307(b) law hold that "[e]very community of 'appreciable size' . . . is *presumed* by the Commission to need at least one radio station for local self-expression." . . . And, where "a transmission service disparity already exists, a different *presumption* applies, namely that the community which has no transmission service has a greater need than the community that already has one (or more)."

100 FCC 2d at 727 (internal citation omitted). Thus, when dealing with two competing and independent communities of appreciable size, a dispositive §307 preference for the community without a first licensed service is all but automatic. *See , e. g., Sunshine Broadcasting, Inc.*, 101 FCC 2d 476 (Rev. Bd. 1985), *review denied*, 1 FCC Rcd 174 (1986), *aff' d by judgment sub nom. L. B. C., Inc. v. FCC*, 865 F.2d 1329 (D.C. Cir. 1988); *New Radio Corp. v. FCC*, 804 F.2d 756 (D.C. Cir. 1986); *Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645 (D.C. Cir. 1986); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135- 1137 (D.C. Cir. 1985). However, as we also explained in *Debra D. Carrigan*, a community's presumptive need for even a first local transmission service can be overcome in two circumstances, which constitute the infrequent exceptions to the "traditional model" line of §307(b) cases: (1) the so-called "Quiet Village" model, where the presumptive need of a tiny community is superseded by the greater need of a much larger, nearby community for competitive broadcast voices, *see Carrigan*, 100 FCC 2d at 731 (citing *Ruarch Associates*, 99 FCC 2d 338 (Rev. Bd. 1984), *review denied*, 101 FCC 2d 1358 (1985); *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781 (Rev. Bd. 1984), *modified sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), *aff'd by judgment sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987)); and (2) the "*Huntington* Doctrine" situation, derived from *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951). Interpreted by the court in *New Radio Corp., supra*, 804 F.2d at 759:

> The *Huntington* doctrine recognizes that, for proposals involving high-power frequencies, where a suburban community is so closely integrated with a central city that it is a mere appendage of the urbanized area, it should not be considered a separate community for purposes of section 307(b).

The court further observed tha (*id.*):

> *Huntington's* premise is that, "where integrally related communities constitute a single metropolitan transmission service area, individual communities' needs should be presumed satisfied by the aggregate of stations in that area." In any case in which that presumption is warranted, a choice under section 307(b) cannot be made, and the choice becomes not "which of two communities show[s] the greater need for a new station, but . . . which of two

applicants would better serve the one large community which both desire[] to cover." *Huntington Broadcasting*, 192 F.2d at 35.

Examples of the "*Huntington* Doctrine" genre are *Carrigan*, *see* 100 FCC 2d at 732-737; and *Arizona Number One Radio*, 103 FCC 2d 550 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 44 (1987), *aff'd by judgment sub nom. Interstate Broadcasting System of Arizona, Inc. v. FCC*, 836 F.2d 1408 (D.C. Cir. 1988).

8. In the instant *I. D.*, the ALJ opined that inasmuch as (1) the AM broadcast frequency here under siege, 610 kHz, is a Class III station, (2) the parties all propose to use the identical operating power and transmission facilities now utilized by RKO's KFRC (AM), and (3) San Francisco is an economic, cultural and recreational hub of a much larger "Bay Area," the "*Huntington* Doctrine" applies, yielding no §307(b) preference for the Richmond applicants. A brief review of the record will illuminate the plain error of the *I. D.* 's §307(b) analysis, and compel the traditional statutory preference for Richmond.

9. *Richmond*. The *I. D.* reflects that Richmond (1980 population 74,676) is the second largest city in Contra Costa County (population 656,380). It is located 16 miles northeast of San Francisco, on the eastern banks of San Francisco and San Pablo Bays, and the City of Richmond covers an area of 53 square miles. *I. D.*, paras. 37-38. There is no direct link across San Francisco Bay between Richmond and San Francisco; automobile traffic from Richmond must first cross the Richmond-San Rafael Bridge into San Rafael, the county seat of Marin County, and then proceed over the Golden Gate Bridge in order to reach San Francisco. *Id.*, para 39. Alternatively, automobile traffic may reach San Francisco from Richmond by first entering Oakland and then accessing the San Francisco-Oakland Bay Bridge. *See id.*, para 69.

10. Richmond is a major industrial and transportation center. It is the largest seaport in northern California in terms of tonnage, and is on the main line of the Southern Pacific Railroad, serving as the mouth of a "land bridge" for freight shipments across the continent. *Id.*, paras. 43, 45. It is also the western terminus of the mighty Sante Fe railroad. *Id.*, para 43. About 200 trucking companies and 300 manufacturing plants are located in the Richmond area. *Id.*, paras. 46, 52. Leading industries include petroleum, chemicals, steel fabrication, shipbuilding, electronics, and food processing and distribution. *Id.*, para. 52. The largest employers include: Chevron U.S.A., 2,100 employees; Chevron Chemical Co., 680 employees; Stauffer Chemical Co., 550 employees; Rheem Manufacturing, 250 employees; Badger Meter Co., 240 employees; Bio-Rad Laboratories, 350 employees; Certain-teed Corp., 250 employees; and Wiegman & Rose International Corp., 200 employees. The largest non-manufacturing entities in the Richmond area are: Chevron Research, 1,238 employees; University of California Field Station, 300 employees; Safeway Stores, 1,350 employees; Sante Fe Railway, 500-600 employees; United Grocers, 550 employees; M. V. Nursery, 380 employees; Hilltop Shopping Center, 3,000-5,500 employees; and various federal, state and local governments, 3,200 employees. *Id.*, paras. 52-53. Of Richmond's labor force of 28,739 workers, 8,940 persons worked within Richmond itself, 6,208 persons worked in the East Bay cities of Oakland and Berkeley, 4,038 persons worked in other parts of Contra Costa County (excluding Pittsburg and Antioch), but only 2,966 Richmond residents worked in San Francisco. *Id.*, para. 54.

11. Richmond is a separately incorporated city, having the Council-City Manager form of government, with an elected nine-member City Council, Mayor, appointed City Manager, and its own Charter and City Code. *Id.*, para. 48. Its city government is organized into the following departments to provide services to Richmond: Police Department (243 employees), Fire Department, Personnel Department, Planning Department, Public Works Department (containing divisions of Building Maintenance, Building Regulations, Engineering, Operations and Waste Water), Finance Department, Port Operations, Human Services Department, Library, Community Development Department, Manpower Services, and Housing Authority. *Id.*, para. 49. Its 1984-85 city budget totaled $117.6 million. *Id.*, para. 50. The City of Richmond is incorporated into the Richmond Unified School District, which serves a population of 200,000 students in a 110 square mile area. *Id.*, para. 58. Richmond also hosts a large variety of parks and recreational areas, cultural facilities, places of worship, medical facilities, and clubs and organizations. *Id.*, paras. 61-65. And, it receives the daily newspaper *West County Times*, which has a circulation office and reporters in Richmond, but is headquartered in Pinole. Also, the weekly shopper *Family Fare* is published in Richmond. While there are no commercial radio or television stations licensed to Richmond, noncommercial Station KECG (FM) is licensed to the Richmond Unified School District at El Cerrito, California. *Id.*, paras. 10, 66.[4]

12. John R. Horton, Executive Vice President of the Richmond Chamber of Commerce, testified that Richmond needs its own radio station because it is an independent community whose governmental activities received scant coverage by distant radio stations. *Id.*, para 98. The ALJ also noted that the area surrounding West Contra Costa County is commonly known as "Greater Richmond." *Id.*, n.18. Telephone numbers for Richmond are listed in the West Contra Costa telephone directory, and all telephone calls to or from San Francisco and Oakland are toll calls. *Id.*, para 70.

13. Commercial and industrial construction projects amounting to more than $2 billion are currently underway or planned for completion by the end of the decade in Richmond. The city has an Industrial Bond Program which has attracted new growth industries, with over $18 million in bonds issued to date. The Richmond Redevelopment Agency has participated in redeveloping four major industrial districts: the Galvin, Harbor Gate, Terrace and Hensley Industrial Districts. In 1981, total taxable sales in Richmond amounted to $708,123,000 or about 17.9% of the total taxable sales of Contra Costa County. Taxable retail sales amounted to $602,471,000. In 1984, total taxable sales in Richmond amounted to $578,363,000 or 11.9% of the County. *Id.*, paras. 55-56. The ALJ recorded that the large-scale planning for a nine-county Bay area for such issues as housing, economic development, environmental quality, transportation, recreation, health and safety, water conservation and utilization was assisted through several region-wide organizations such as the Association of Bay Area Governments, the Bay Area Air Quality Management District, the Regional Water Quality Control Board, the Metropolitan Transportation Commission, and the Transit Operator Coordinating Council. *Id.*,

paras. 74-84. Nevertheless, the record does not indicate that these regional functions replace in any significant way the day-to-day local governmental functions administered by the City of Richmond.

14. *Huntington Doctrine*. As iterated in *Carrigan, supra*, the criteria traditionally consulted to determine the applicability of the "*Huntington* Doctrine" are:

> o Power and class of station.
>
> o Independence or interdependence of specified "community to central city of "urbanized area."
>
> o Size and proximity of specified "community" to central city of "urbanized area."
>
> o Signal population coverage and relevant advertising market.

100 FCC 2d at 729; *see also New Radio Corp., supra*, 804 F.2d at 761; *Beaufort County, supra*, 787 F.2d at 652-653. Importantly, though, "[t]he *Huntington* doctrine's policy of treating politically separate entities as a single entity is an 'exceptional' one, and the FCC bears the burden of justifying and providing 'adequate reasons' for any extension of the *Huntington* policy." *Id.*, at 654 (citing *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199, 200-201 (D.C. Cir. 1965)). The Commission recently acknowledged that burden in *Faye & Richard Tuck*, 3 FCC Rcd 5374, 5375-5380 (1988), where it reviewed its "*Huntington* Doctrine" experience and declared that:

> The ultimate focus of our analysis in these cases is the characteristics of the specified community rather than the technical aspects of the applicant's proposal. Thus, the most important consideration under *Huntington* is the relationship between the specified and the central city of the Urbanized Area. In comparison, evidence on the remaining criteria -- the size and proximity of the specified community to the central city, and signal population coverage -- is pertinent, but has less significance than evidence of interdependence.

Id., at 5377. Indeed, the *Tuck* Commission -- emphasizing the energy of the traditional §307(b) presumption in favor of unlicensed communities -- even went so far as to eliminate its future concern with the "proposed power and class of station," *id.*, theretofore one of the cardinal criteria consulted to decide the applicability of the "*Huntington* Doctrine." *See, e. g, Carrigan, supra* ; *Arizona Number One, supra*. [5]

15. We find that the *Huntington* criteria are clearly not met in the instant Richmond context. Richmond, which is itself a vital city of approximately 75,000 persons, and located 16 miles across the San Francisco and San Pablo Bays from San Francisco (while sharing no land border with it), has its own independent government performing the full panoply of complex governmental functions and municipal services. [6] For its purposes, Richmond has a substantial city budget and a major industrial bond program intended for urban redevelopment. It is, in its own right, a major industrial center, home to numerous large companies employing a substantial number of its own residents, as well as workers from surrounding areas. As a key city of Contra Costa County, it has a local school system, many local medical facilities, scores of local civic organizations, 150 local places of worship, and an impressive compliment of cultural and recreational sites. By contrast, there is insufficient record evidence that Richmond area residents -- who must pay a toll call in order to even telephone San Francisco -- view themselves foremost as part of a unitary "Greater San Francisco" community. In fact, there is evidence that they and their neighbors of western Contra Costa County consider themselves to be residents of "Greater Richmond." Thus, under the premier *Huntington* criterion, the record evidence shows Richmond to be a substantial city "independent" of San Francisco, having its own municipal needs, problems, demographic characteristics, businesses, and civic life.

16. It is true that all of the applicants here propose the same operating power and class of radio station, thus providing the same population coverage with their respective signals. And, while there is very little record evidence of advertising market, another criterion, we assume that many San Francisco advertisers would buy time on the Richmond station. However, a locally licensed station will permit Richmond businesses to more selectively target their own prime consumers, without having to pay full San Francisco radio station rates, at least at the outset. This latter inference follows, in part, from the Commission-imposed primary service obligation of a broadcast station to its specific community-of-license, *see* 47 CFR §73.1120, and from the likelihood that Richmond residents will be attuned to a Richmond station for its coverage of local news, crises, and routine events. In short, Richmond's independence and importance as its own economic and civic hub, coupled to its physical distance to and demographic dissimilarity from San Francisco, play a strong role in our immediate §307(b) analysis.

17. *Summary of § 307 (b) Issue*. We have laboriously reviewed the evidence of record tendered in an attempt to show the inextricable interdependence between Richmond and San Francisco (and/or the mammoth Bay area), so as to discern whether the presumptive need of Richmond for its first licensed aural transmission service has been successfully rebutted. In sum, that evidence (as encapsulated accurately and fairly by Gold Coast [7]) falls far short of what would be necessary to deprive Richmond of a dispositive §307(b) preference. Granted, the underlying evidence does bespeak a healthy and active intercourse between Richmond and other Bay area localities, if not with San Francisco itself. But, the identical claim could be made regarding any independent city located near a larger metropolitan area, no matter the size or idiosyncrasies of that independent city. *E.g.*, Washington, D.C./Arlington, Va.; Chicago, Ill./Gary, Ind.; Philadelphia, Pa./Wilmington, Del.; Dallas/Ft. Worth, Texas, *etc., etc.* It is for that very reason that the Commission has steadfastly declined "to extend [*Huntington*] beyond its original application -- that of a central city and its *contiguous suburbs*." *Faye & Richard Tuck, supra*, 3 FCC Rcd at 5376 (emphasis added). Certainly, Richmond is not a "contiguous suburb" as exemplified in *Arizona Number One* (*Huntington* applied to Phoenix, Arizona burb of Peoria). Nor is Richmond existentially homologous with its "neighboring" city, as in *Debra D. Carrigan* (Paradise, Nevada all but coextensive with Las Vegas). And, just as the *Pasadena Broadcasting* court waxed critical of the Commission's treatment of Fullerton, Whittier, and Pasadena as "a homogeneous part of Los Angeles," we find that the record here creates no "San Francisco presumption" to enshroud all of the independent cities in the Bay

Area that necessarily interact with their larger, richer neighbors. In fact, *Huntington* is glaringly less applicable here than in *WHW Enterprises*, where the Board awarded a dispositive §307(b) preference to Portage, Michigan over its cross-town, sister-city of Kalamazoo. The court there agreed that Portage was " *a separate and distinct community*, " and thus entitled summarily to the facility under *Allentown Broadcasting*. [8] Finally, the entreaties here to lump the autonomous City of Richmond into a sprawling San Francisco Bay "community" would seduce us straight back to the slag pile that led to the court's reversal in *Miners Broadcasting Service*, *supra*, after the Commission applied the "*Huntington* Doctrine" to an Aliquippa, Pennsylvania applicant, finding that applicant's proposal to be indistinguishable from the general run of Pittsburgh stations. Much as Richmond is to San Francisco, Aliquippa is an independent City 12 miles to the southeast of Pittsburgh, and the *Miners* court has impelled us too far down the §307(b) road to descend once again into a pre- *Miners* pit.

18. Lastly, the Board was asked at the oral argument to take official notice of the fact that the Census Bureau has placed Richmond in the San Francisco/Oakland "Urbanized Area," [9] the requestants citing U.S. Census Bureau Publication PC 80-1-A6 (1980), pp. 5-40 through 6-40; and that the *Faye & Richard Tuck* Commission indicated that, until completion of its *Metropolitan Areas* Rule Making, [10] "the public interest would be best served by using the [Census Bureau's] Urbanized Area concept in connection with a *Huntington* analysis as the standard for defining a metropolitan area 'community' in section 307(b) adjudicatory cases." Until *Tuck*, the Commission had mainly eschewed utilizing Census Bureau designations in Section 307(b) analyses, *see Suburbanaire, Inc.*, 104 FCC 2d 909, 912-913, n.9 (Rev. Bd. 1986). The question here is: did *Tuck* elevate the "Urbanized Area" designation to determinative status. We think not. "[E]ver wary of extending [*Huntington*] beyond the doctrine's original premises concerning the overlapping transmission needs of a central city and its *contiguous suburbs*," the *Tuck* Commission simply held that the Census Bureau's determinations would henceforth be relevant, 3 FCC Rcd at 5379; but "relevant" and "determinative" are concepts as far apart as Richmond from San Francisco. Stating emphatically that its *Tuck* decision was "to clarify, rather than to expand or narrow, the scope of the *Huntington* exception," *id.*, at 5377, the opinion as a whole makes clear that a showing of economic, cultural, and municipal interdependence remains uppermost, *see id.*, at 5377-5379, based on a multifaceted examination of the characteristics of the central city and its particular "contiguous suburb." As if to underscore our interpretation, *Tuck* itself remanded for "interdependence" evidence the communities of Garland and Plano, Texas, despite the fact that both communities were squarely within the Dallas/Ft. Worth "Urbanzied Area." *Id.*, at 5380-5381. Hence, a Census Bureau designation of "Urbanized Area," while now considered relevant and helpful, is clearly not the final word on *Huntington* applicability. Here, and assuming the accuracy and currency of the Census Bureau tract submitted, the San Francisco/Oakland "Urbanized Area" is gargantuan, covering (in whole or part) seven counties: Alameda (population 1,093,543); Contra Costa (population 540,651); Marin (population 207,665); Napa (population 5,712), San Francisco (population 678,974), San Mateo (population 565,828); and Solana (population 98,325). And these population figures represent only those county residents who reside within the geographical limits of the immense San Francisco/Oakland "Urbanized Area." We cannot, and will not, regard every city so encompassed to be an amorphous suburb of San Francisco (or of Oakland, or both). Without passing on each and every city so circumscribed, the record here gives Richmond an independent identity sufficient to warrant its own radio broadcast station. San Francisco would simply have to cope with its 24 other radio stations (and 8 TV stations), should RKO forfeit its AM station license.

CONCLUSIONS

19. Under the issues set forth in the *Hearing Designation Order*, "it is concluded that a choice among the applicants *should* . . . be based solely on considerations relating to Section 307(b)" (*see supra* para. 5); and that -- pursuant to timeless case law -- there is no occasion to resolve what is known as the "contingent" standard comparative sub-issue as amongst the various competing applicants, who are effectively eliminated from further comparative consideration under §307(b). *WHW Enterprises*, *supra*, 753 F.2d at 1135 & n.16 (contingent comparative findings unnecessary for applicants eliminated under §307(b)); *Allentown Broadcasting*, *supra*. Indeed, dawdling further over the mountain of extraneous, purely academic exceptions would be somewhat inconsistent with the Commission's directive to the Board to issue a decision here with the "*highest priority*" (*see supra* para. 2). In that vein, and of the two Richmond applicants, we have previously ruled against Cozzin in *RKO General, Inc.* (*WAXY - FM)*, FCC 89R-34, released June 6, 1989 (Ft. Lauderdale), where we upheld against Cozzin's identical exceptions the conclusion reached by Judge Walter C. Miller in his *Contingent Initial Decision*, 86D-47, released July 23, 1986 (Boston), [11] that Cozzin was not qualified to be a broadcast licensee by virtue of the conduct of its 49% shareholder, Joseph Zingale, in connection with 46 Low Power Television applications. As in our companion Ft. Lauderdale *RKO* case, we again find Cozzin's exceptions to its disqualification in the Boston *RKO* proceeding to be utterly unavailing. It is equally disqualified for any Richmond, California station.

20. Conversely, no party here has seriously attacked the basic qualifications of the remaining Richmond applicant, South Jersey, whose dispositive §307(b) preference is manifest. Pursuant to the express instruction of the Commission's February 14, 1989 *Memorandum Opinion and Order*, we hereby "deny[ ] those applicants not ranking first" (*see supra* para. 2), and conclude that South Jersey's indefeasible §307(b) preference ranks it, virtually by operation of law, as the best qualified challenger to the incumbent licensee, RKO. Hence, pursuant to *Pillar of Fire*, *supra* note 3, South Jersey's §307(b) advantage shall be contingent on any superior "renewal expectancy" accruing to RKO, should the Commission find RKO so entitled in its parallel (Phase I) proceeding.

21. ACCORDINGLY, IT IS ORDERED, That the unopposed petitions for leave to amend and the unopposed petitions for leave to file information statement: filed by RKO General, Inc. on August 5, 14, September 5, 12, 18, 29, 30, December 31, 1986, February 25, March 24, April 2, 20, May 7, 28, June 25, August 26, September 15, 17, 25, October 23, November 5, December 7, 16, 1987, January 5, March 11, April 27, May 12, June 24, November 17, 1988, and February 7 and 23,

1989; filed by South Jersey Radio, Inc. on August 5, 1986, April 16, 1987, and November 16, 1987; filed by Paul J. Growald on August 26, 1986, and March 31, 1987; filed by Gold Coast Broadcasting, Inc. on September 9, 1986, and April 16, 1987; and filed by Cozzin Communication Corp. on October 3, 1988 ARE GRANTED, and the amendments and information statements ARE ACCEPTED; and

22. IT IS FURTHER ORDERED, That the applications of Gold Coast Broadcasting, Inc. (File No. BP-800930AL), Paul J. Growald (File No. BP-830509AE), Gold Mountain Broadcasting Co. (File No. BP-830512BX), and Cozzin Communication Corporation (File No. BP-830512BQ) ARE DENIED; and

23. IT IS FURTHER ORDERED, That the application of South Jersey Radio, Inc. (File No. BP-830511AG) is RANKED FIRST in the captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Many of the original 13 RKO comparative proceedings have terminated in amicable settlements. *See, e.g., RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988), *appeal docketed sub nom. Los Angeles Television, a Limited Partnership v. FCC*, No. 88-1673 (D.C. Cir. Sept. 16, 1988); *RKO General, Inc. (WHBQ)*, 3 FCC Rcd 5055 (1988); *RKO General, Inc. (WGMS)*, 3 FCC Rcd 5262 (1988); *RKO General, Inc. (WRKO)*, 3 FCC Rcd 6603 (1988).

[2] The dynamics of a "renewal expectancy" are outlined in *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

[3] At oral argument before the Board, the question arose as to whether those applicants specifying San Francisco, rather than a different community better entitled under the tenets of §307(b), lacked notice that §307(b) considerations would be given decisional weight in this comparative renewal setting, even if only on a "contingent" basis *vis-a-vis* the incumbent RKO. Thus, noting that all (but one) of the instant competing applications filed against the incumbent RKO were submitted in 1983, it was posited that, in 1982, *Pillar of Fire*, 90 FCC 2d 1021 (1982), refused to add a §307(b) issue where a license renewal challenger had also specified a community different than the incumbent's, and that challenger demanded a §307(b) comparison. In that 1982 *Hearing Designation Order*, the Commission noted:

> Though the renewal application of Pillar (Zarephath) and the construction permit application of Radio [New Jersey] (Somerville) are for different communities, Radio has proposed a transmitter site only 770 feet from the present WAWZ(FM) site which is located between the two towns. Examination of Pillar's and Radio's applications reveals that the effective radiated power (ERP) of both stations is nearly identical: 37 kW for WAWZ(FM) as opposed to 36.5 kW for Radio. In addition, there is only a one foot difference in the height above average terrain for the two antennas. The transmitter sites, ERP and HAAT indicate that the coverage of the two stations will be essentially the same. In view of these facts, the existing record does not justify a §307(b) issue. *RKO General, Inc. (KHJ - TV)*, 5 FCC 2d 517 (1966), *review denied*, FCC 66-1172, released December 29, 1966. *See also Fidelity Television, Inc. v. FCC*, 515 F.2d 684, *rehearing denied*, 515 F.2d 703 (D.C. Cir. 1975), *cert denied*, 423 U.S. 926 (1975).

Id., 90 FCC 2d at 1022 n.1. Accordingly, neither the ALJ nor the Board considered evidence relating to §307(b) in *Pillar of Fire, see, e.g.*, 99 FCC2d 1256, 1257 (Rev. Bd. 1984). Upon application for review by the (non-incumbent) Somerville, N.J. applicant, the Pillar of Fire Commission contemplated afresh the mechanical interplay -- in comparative renewal contests -- between the equitable frequency distribution mandate of §307(b),on the one hand, and any conflicting "renewal expectancy" imperatives, on the other hand. Recognizing, of course, that -- by its terms --§307(b) applies to "applications for licenses, and modifications and renewals thereof (emphasis added), the *Pillar of Fire* Commission acknowledged that "the better course of action would have been to specify a §307(b) issue in this comparative renewal proceeding," 2 FCC Rcd 519 (1987), and it announced by way of clarification that *(id.)*:

> to assure that a full record is developed in similar cases in the future, we will include a contingent 307(b) issue in those comparative renewal proceedings where the applicants propose service to different communities. Under current procedures this will be limited to proceedings involving standard broadcast stations. With regard to FM and television stations, 307(b) determinations are to be made in the context of antecedent Rule Making proceedings and not as part of the comparative renewal process. The 307(b) issue will be contingent on whether the incumbent licensee demonstrates that it has earned a renewal expectancy. Absent this showing, the presiding ALJ will then decide the case on the basis of 307(b) or on the basis of the standard comparative issue, as dictated by the particular facts.

In our instant comparative renewal proceeding, the future is "now," for we have indicated that the 1984 *Hearing Designation Order* controlling this case did include the customary §307(b) issue, at least as amongst the several applicants challenging the incumbent RKO; and, that 1984 Commission Order accorded §307(b) its quotidian primacy, as between all of the competing applicants not seeking a license renewal, as is RKO. Hence, the law of this case is fixed because:

> It is "black-letter law" that "where there ha[s] been a thorough consideration of the particular question in the designation order," subordinate staff officials such as presiding hearing officials, or even the Board, may not reconsider the matter or take any action inconsistent with the designation order.

Ft. Collins Telecasters, 103 FCC 2d 978, 983-984 (Rev. Bd. 1986) *(Hearing Designation Order* controls the issues, citing *Atlantic Broadcasting Co.*, 5 FCC2d 717, 720-721 (1966)), *review denied*, 2 FCC Rcd 2780 (1987), *aff'd by judgment*, 841 F.2d 428 (D.C. Cir. 1988); *see also Newton Television Ltd.*, 3 FCC Rcd 553, 557 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 2561 (1989). Ergo, the Board is enjoined by the *Hearing Designation Order* in this subject proceeding to not only consider §307(b) evidence, but to first discern whether any of the RKO renewal challengers

arrayed before us is statutorily entitled to a dispositive §307(b) preference, such that other internecine arguments over comparative superiority lapse wholly academic.

Inasmuch as the Phase II adjudication before us seeks merely to rank, interse, the renewal challengers later to confront one-on-one the incumbent RKO, whose entitlement, *vel non,* to a "renewal expectancy" will be decided ultimately in a parallel (Phase I) proceeding, our selection of the best qualified renewal challenger on §307(b) grounds meshes perfectly with the mechanics set out in *Pillar of Fire,* since South Jersey's patent §307(b) preference is itself "contingent," and dependent ultimately upon any superior "renewal expectancy" accruing to the incumbent RKO. So, just as in *Pillar of Fire,* where nothing estopped that renewal challenger from specifying a better §307(b)-entitled community, nothing estopped the San Francisco applicants here from specifying -- as did Cozzin and South Jersey -- a better §307(b)-entitled community, on the contingency that the Commission collaterally determined that RKO was not entitled to an even higher priority "renewal expectancy." Section 307(b) is clear by its terms that it applies to license renewal proceedings; and the current San Francisco applicants cannot be heard to complain -- more than 4 years after the issuance of the *Hearing Designation Order* in this case (as well as in the face of unambiguous statutory language)-- that they lacked notice that §307(b) considerations could be dispositive as against the other renewal challengers we here rank. After all,it was and is self-evident that any and all challinging applicants compete not only against the incumbent licensee, but against each other as well, hoping to demonstrate their comparative superiority over all of the other license challengers.

Finally, and insofar as we are aware, no party here has challenged the primacy of §307(b) established by the *Hearing Designation Order* in this Phase II proceeding. Thus, even were the Board not bound conclusively by the *Hearing Designation Order,* any objections to the primacy of §307(b) in this parallel phase of the larger RKO renewal proceeding are forever waived. 47 CFR §1.277(a).

[4] Noncommercial broadcast service is not relevant to the resolution of a §307(b) issue as amongst commercial broadcast applicants. *Valley Broadcasters, Inc.,* 104 FCC 2d 1549, 1561 (Rev. Bd. 1986); *Kaldor Communications, Inc.,* 98 FCC 2d 292, 294 n.4 (Rev. Bd. 1984); *cf. FBC, Inc.,*95 FCC 2d 256, 260-261 (Rev. Bd. 1983) (noncommerical service irrelevant incomparative coverage context), *review denied,* FCC 85-309, released June 14,1985; *Yolo County Public Radio,* DA89-530, released May 23, 1989 (at para.8) (commercial broadcast stations not counted in non-commercial §307(b) comparisons).

[5] *But cf. Tuck,* at 5381 (Commission takes notice that Waxahachie, Texas applicant's "proposal to use only 1 kw of power during the day is significantly more modest than the clearly regional proposals ofthe competing applicants, which will operate at 5 to 10 kw during the day"). *Tuck's* policy change, which now holds that "the proposed power and class of station is not pertinent in deciding whether *Huntington* should apply" (id., at 5377), came long after the *I.D.* was issued in this instant proceeding. However, since "power and class" of station was always only one of our several *Huntington* reference criteria, and we find that Richmond meets nearly none of the other equally critical criteria for applying Huntington, we need not decide whether to apply *Tuck's* policy change retroactively to the case at hand.

[6] Without over emphasizing the significance of Richmond's independent government as a factor in the comprehensive *Huntington* analysis, we cannot but recognize that the "need" of a community for its own licensed transmission service is linked to the intent of Congress that broadcasting play a critical role in ensuring an "informed electorate." *See* 47 U.S.C. §315 (equal political time); id., §312 (reasonable access for federal candidates). *See also Alternatives to General Fairness Doctrine Obligations of Broadcast Licensees,* 2 FCC Rcd 5272, 5273 (1987) (FCC concerned with "the all-important goal of an informed electorate"); *Cyril E. Sagan,* 1 FCC Rcd 10 (1986) ("Congress intended . . . to foster a more informed electorate"); *Henry Geller,* 95 FCC 2d 1236, 1244 (1983) (same). The Richmond electorate, without a station licensed to serve its particular needs, is substantially bereft of the political advantages bestowed by a local station, as perceived (and intended) by Congress.

[7] Reply of Gold Coast Broadcasting to Exceptions, filed April 7, 1989 at 3-8. Indeed, at oral argument before the Board, counsel for Gold Mountain submitted that "the [Gold Coast] reply brief . . . certainly comes about as succinctly to the mark as one could in summarizing the relevant record evidence." Tr. 5399. We quite agree.

[8] 753 F.2d at 1137 (emphasis added). While the San Francisco applicants here assert that Richmond is not a "separate and distinct" community, as we found Portage, Michigan to be in *WHW,* the instant *I.D.* reports that:

> The Black population accounted for 47.5% of [Richmond's] population and whites comprised 36.1% of the population. Asian and Pacific Islanders accounted for 5.1% of the population and individuals identifying their ethnicity as Spanish accounted for 10.3% of the population.

Id., at para. 41. Though racial or ethic clusters do not, in and of themselves, constitute a "community" for §307(b) purposes, *WHW Enterprises, Inc.,* 89 FCC 2d 799, 810 (Rev. Bd. 1982) (citing *Riverside Amusement Park Co.,Inc.,* 69 FCC 2d 1040, 1041-1043 (1978)), *aff'd in pertinent part, WHW Enterprises, Inc. v. FCC, supra,* Richmond's nearly half-black population would certainly appear to render it "distinct" from San Francisco; or, so far as the record shows, the expansive Bay area. *Compare I.D.,* para. 12 (San Francisco 12.7% black, 12.3% Hispanic). It is high time that the heavily minority city of Richmond stand first in line, at least, for its initial broadcast station, and not be eternally reliant upon distant Bay area stations for coverage (if any) of Richmond, should RKO not retain its San Francisco AM station license.

[9] We also note, as did the ALJ, that although the U.S. Bureau of the Census has included Richmond's Contra Costa County within the "San Francisco-Oakland Standard Metropolitan Statistical Area" and the "San Francisco-Oakland-San Jose Consolidated Metropolitan Statistical Area," it located Contra Costa County in the Oakland Primary Metropolitan Statistical Area ("PMSA"), and not in the San Francisco PMSA. *I.D.,* paras. 71-72.

[10] *Section 307(b) Preferences Within Metropolitan Areas,* 48 Fed. Reg. 19428, published April 29, 1983. This Rule Making remains unresolved.

[11] Collateral estoppel lies against Cozzin on the question of its basic qualifications, a question resolved by the Board in its recent Ft. Lauderdale RKO decision. *See Montgomery County Media Network,* FCC 89R-27, released May 5, 1989 (vicissitudes of the doctrine of collateral estoppel).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-17

In re Applications of

DONALD E. HILGENDORF — File No. BPH-861020TA

TRAN BROADCASTING CORPORATION, INCORPORATED — File No. BPH-861020TB

For Construction Permit
for a New FM Station at
Brookfield, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1989; Released: June 21, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board are the *Initial Decision*, 3 FCC Rcd 7307 (1988)(I.D.) of Deputy Chief Administrative Law Judge James F. Tierney (ALJ), and the exceptions and replies thereto filed by Donald E. Hilgendorf (Hilgendorf) and Tran Broadcasting Corp., Inc. (Tran) in the captioned proceeding.

2. The sole issue specified in the *Hearing Designation Order*, 3 FCC Rcd 690 (1988)(HDO), was the standard comparative issue (including comparative coverage). By *Memorandum Opinion and Order*, FCC 88M-1669, released May 31, 1988, the ALJ added an issue to determine if the proposed tower of Hilgendorf would be a hazard to air navigation. However, that issue was later resolved in Hilgendorf's favor by *Memorandum Opinion and Order*, FCC 88M-3906, released November 16, 1988. Neither party has excepted to this resolution of the "air hazard issue," and the ALJ's I.D. turned solely on comparative considerations. Thus, the ALJ concluded that both applicants were virtually equal, except for the qualitative enhancements under the integration of ownership and management criterion. Under that criterion, he found that Hilgendorf's long-term local residence (100% for 13 years) outweighed Tran's service area residence and broadcast experience (both 100%), thus justifying a grant of Hilgendorf's application.

3. Both parties have submitted exceptions to the ALJ's findings and conclusions on the comparative factors. Tran, however, additionally raises exceptions to the ALJ's failure to add basic qualifying issues with respect to Hilgendorf (*i. e.*, financial and real-party-in-interest). [1] Our initial review of the foregoing documents, and the transcript of the proceeding below, indicates that Tran's exceptions give rise to substantial and material questions concerning Hilgendorf's financial qualifications, and the representations made with respect thereto. Thus, as we are ordering herein, the presiding ALJ shall take additional evidence, and issue a Supplemental Initial Decision concerning Hilgendorf's financial qualifications.

4. *Background* : Following the initial close of the record on August 4, 1988, Tran filed a petition to enlarge issues (on August 30, 1988) alleging that Hilgendorf, based upon testimony elicited at hearing, had misrepresented his financial qualifications. The ALJ denied that petition by *Memorandum Opinion and Order*, FCC 88M-3432, released October 18, 1988. [2]

5. Tran has renewed this argument in its exceptions, and observes that when Hilgendorf filed his application on October 20, 1986, he specifically certified (FCC Form 301, Section III) that he possessed "reasonable assurance" of sufficient net liquid assets to construct and operate as proposed. However, at hearing, Hilgendorf revealed that his principal reliance on available funds was based upon the following (Tr. 103):

> My home is worth X number of dollars, the liquidity, or the value, the money I could get out of it, was quite a bit. The two businesses that I have would either be sold or could be managed profitably.

Hilgendorf also testified (in response to a line of questions apparently designed to elicit information concerning his ability to effectuate his proposal to work fulltime at the station) that he had listed his two businesses for sale about two or three months prior to hearing, but had gotten little response; and, for the five or six weeks immediately prior to hearing, he had listed the businesses for sale with a broker. As a result, there were several purported "interested" prospective purchasers. (Tr. 120). Tran thus argues that Hilgendorf did not demonstrate the availability of sufficient net liquid assets to meet his financial commitment to his proposed station at the time he certified his application, and, therefore, misrepresented salient facts to the Commission.

6. In response to Tran's exceptions, Hilgendorf has submitted a copy of his Declaration, dated September 10, 1988, which was earlier filed with his opposition to motion to enlarge issues (on September 14, 1988). In pertinent part, Hilgendorf declares (Hilgendorf Reply to Exceptions, Exh. A; emphasis added):

> At the hearing, Tran's attorney asked me what steps I had taken to determine that I could properly answer the financial certification questions in my application affirmatively. The first part of my answer was that *my home and two businesses were worth a certain amount, and that I had my personal assets - - particularly these two major assets - - in mind and concluded that they would produce more than enough cash to finance the construction and first three months' operation of my station. I still believe that these assets would produce sufficient funds to finance the station entirely from my personal resources.*
>
> My application was filed without communications counsel. Shortly after I retained counsel, and acting on counsel's advice with regard to the Commission's documentation requirements, I obtained a written

> commitment for a loan sufficient to cover the entire cost of construction and three months' operation without other resources. This commitment is still in effect and is in a form which counsel advised me was sufficient to meet the FCC's requirements. *It was also easier to document this loan commitment under FCC standards than to document the value of my business and home.*

7. *Discussion* : The Commissions' instructions to FCC Form 301 are unambiguous (FCC Form 301, Instructions, Section III):

> An applicant for a new station must certify that it has sufficient liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractural requirements, if any, as to collateral, guarantees, and capital investments. As used in Section III, "net liquid assets" means the lesser amount of the net current assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.

These instructions also expressly provide that, although documentation supporting the "certification of financial qualifications need not be submitted with this application, [such documentation] must be available to the Commission upon request." The averments required (by Questions 1 and 2 in Section III, FCC Form 301) are similarly specific:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractural requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (*excluding banks, financial institutions, and equipment manufacturers)* have sufficient net liquid assets to meet these commitments.

See Port Huron Family Radio, Inc., 4 FCC Rcd 2532, 2539-2540 (Rev. Bd. 1989). As indicated, Hilgendorf affirmatively certified Questions 1 and 2 in his application filed October 20, 1986.

8. Central to our review of the instant proceeding is the Commission's recent *Memorandum Opinion and Order* in *Opal Chadwell*, 4 FCC Rcd 1215 (1989), remanding an applicant for further hearing on financial qualifications. In that proceeding, we initially had some misgivings concerning the availability of sufficient funds to Chadwell. Thus, the Board requested the submission of additional financial data. *Opal Chadwell*, 2 FCC Rcd 2981 (Rev. Bd. 1987). Based upon those submissions, we found Chadwell financially qualified. *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987). While applications for review were pending, the Commission also requested additional financial data to assist in its resolution of the matter. *Order*, FCC 88I-045, released May 5, 1988. After reviewing those further submissions, and allegations raised therein for the first time by a competing applicant, the Commission, while finding "no error in the Board's treatment of the existing record," concluded there were unresolved questions concerning financial qualifications requiring remand for further hearing. *Opal Chadwell, supra*, 4 FCC Rcd 1215, 1216-1217.

9. More specifically, the Commission directed the ALJ to determine whether, *at the time* Chadwell first certified her financial qualifications, she had available sufficient assets to meet her already documented $1,412,390 in estimated costs. *Id.*, at 1217. Chadwell's problems initially arose because she intended to rely principally on the sale of "non-liquid" assets (*i. e.*, real estate, including limestone deposits, and her ownership interest in a cable television system) to produce funds to construct and operate her proposed television facility. While noting that "the Commission permits an applicant to rely on illiquid assets, such as real estate, where an applicant furnishes a relevant appraisal of the property. *Christian Children's Network, Inc.*, 101 FCC 2d 612, 614, para. 5 (1985)," (*Id.*, at 1215), the Commission found that additional conflicting appraisals submitted raised substantial and material questions concerning the availability of funds to Chadwell (*Id.*, at 1215-1216). [3]

10. Here, it appears that Hilgendorf intended, at the time he certified and filed his application, to principally (or, perhaps, solely) rely on non-liquid assets (*i. e.*, his home and two businesses) to provide sufficient funds to construct and operate as proposed. In light of these revelations, and the Commission's holding in *Opal Chadwell, supra*, 4 FCC Rcd 1215, we shall remand this proceeding to the presiding ALJ for the adduction of additional evidence with respect to Hilgendorf's financial qualifications. Hilgendorf, *inter alia*, will be required to document (1) his originally planned costs of construction and operation as formulated and reviewed before certifying and filing his application; (2) his financial condition (with pertinent financial statements) relied upon as of the date of certification (clearly delineating liquid and non-liquid assets, as well as current and long-term liabilities); (3) appraisals of non-liquid assets relied upon, if any; (4) the date he retained counsel in this proceeding; and (5) the "written commitment for a loan" referenced in Exhibit A of his Reply Exceptions.

11. Our action here is also in keeping with the Commission's concern expressed in its *Report and Order In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, FCC 89-110, released April 20, 1989. As the Commission stated in this *Report and Order* (at paras. 15-16; emphasis added):

> Our goal in modifying Form 301 was to streamline and expedite the application process . . . . However, based upon our experience in the intervening eight years . . . .we now recognize that these forms have had unintended results that are not necessarily in the public interest.
>
> As discussed in detail below, we now believe that streamlining the application process may have facilitated the filing of applications by financially un-

qualified, sham and/or abuse applicants and made it more difficult to detect such applicants once they are in a comparative proceeding. *By financially unqualified applicants we mean those who do not have sufficient net liquid assets on hand or committed sources of funds to construct and operate the proposed facility for three months.*

12. ACCORDINGLY, IT IS ORDERED, That this proceeding is REMANDED to the Presiding Officer herein for the adduction of additional evidence, and the issuance of a Supplemental Initial Decision, on the following issue:

(1) To determine whether Donald E. Hilgendorf was financially qualified at the time he filed his application, and, if not, the effect thereof on his basic qualifications to be a Commission licensee.

13. IT IS FURTHER ORDERED, That the initial burden of introduction of evidence on the foregoing issues SHALL BE on Tran Broadcasting Corp., Inc., and that the burden of proof SHALL BE on Donald E. Hilgendorf.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Tran also attempts, again, to raise a "real-party-in-interest" issue with respect to the participation of one Tom Snyder, proposed program director of Hilgendorf's facility. Tran alleges that Snyder has made all decisions regarding the preparation and prosecution of Hilgendorf's application, and will be in actual control of the station. Tran has submitted no evidence, and, indeed, has not alleged that Snyder will have any ownership interest or financial stake in the facility. It has been consistently held that the test for determining whether a party is a "real-party-in-interest," is whether that party will be in a position to actually, or potentially control the operation of the station. *See, e.g., Wilcox Broadcasting, Co. v. FCC,* 260 F.2d 712 (D.C. Cir. 1958); *High Sierra Broadcasting Inc.,* 96 FCC 2d 423, 435 (Rev. Bd. 1983). Thus, we agree with the ALJ that no such issue lies here *(Memorandum Opinion and Order,* FCC 88M-3432, released October 18, 1988 at para. 8):

> Little more than surmise or speculation attaches to Tran's allegations of the role played by Hilgendorf's mentor, (if that is the word), with no discernible financial stake in the proposed station, albeit an experienced presently gainfully employed Program Director; whom Hilgendorf, apparently a successfully small entrepreneur and whose interest in broadcasting may have been stimulated by that "mentor," is of no disparagement in his quest for broadcast license. That simply is our system; even with the latter day multiplicity of broadcast services, inexperienced, perhaps neophyte, newcomers are still welcome, in a sense, plainly preferred. *Cf. Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 396 (1965). On its merits then, Tran's allegations, without more, concerning "real-party-in-interest" fail in persuasion.

[2] In denying the financial aspects of Tran's petition, the ALJ was apparently persuaded by the purported existence of a "written commitment for a loan" to provide funds for Hilgendorf. It is apparent that Hilgendorf obtained this document subsequent to the time he certified and filed his application. However, the ALJ stated (Order, at para. 9):

> Equally, even though the reasons for non-disclosure at trial are less than compelling and though the point-in-time of the bank letter loan is not disclosed precisely in the evidence -- apparently it followed closely the filing of the application and retention of communications counsel --even at this late hour, were that bank letter to be relied upon, the common thread or seamless garment of precedent in comparative considerations, is that no one has a vested interest in the disqualification of another, rather the best *qualified* is the general acid test; hence, whatever may be the procedural posture of the bank letter, it apparently not being an eleventh hour bootstrapping, seemingly could, if chosen, meet the good cause criteria, even if a post-designation amendment. But, Tran might say and Hilgendorf concede, that Hilgendorf is not relying on that bank letter; rather, on the original application itself coupled with the *residuum* of testimonial evidence given by Hilgendorf. Yet, having noted that that bank letter, perhaps a possible counseled afterthought, would even now buttress the Hilgendorf financial viability, do we not then engage in frivolous wrestling with shadows in further scrutiny of the financial thesis? Much the same can be found on the proposed "misrepresentation" issue, as no convincing indicia of deliberate deceit or misleading is apparent under the pleadings.

Of course, if it is determined that Hilgendorf did not have "reasonable assurance" of net liquid assets sufficient to construct and operate as proposed at the time he certified his application, his subsequently obtained document (whatever it may purport to demonstrate) may well be unavailing. *George Edward Gunter,* 104 FCC 2d 1363, 1366 (Rev. Bd. 1986); *see Port Huron Fam ily Radio, Inc.,* 4 FCC Rcd 2532, 2541 n. 6 (Rev. Bd. 1989); *RKO General, Inc., (WAXY-FM),* FCC 89R-34, adopted May 24, 1989, at para. 49.

[3] We note in passing that following remand, Chadwell's application has been dismissed by the ALJ in that proceeding for failure to prosecute and abuse of process. *Memorandum Opinion and Order,* FCC 89M-1568, released June 2, 1989. The Presiding Officer there observed, *inter alia,* that Chadwell failed to produce ordered documents in the discovery process, failed to appear at her scheduled deposition, and purportedly contacted five prospective non-party deponents and told them not to appear for their depositions. *(Order,* FCC 89M-1568, at paras. 5-8).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-285

In the Matter of

Amendment of Section 73.202(b), RM-6582
Table of Allotments,
FM Broadcast Stations.
(Gould, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 1, 1989; Released: June 21, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of Arkansas Radio Company (petitioner), seeking the allotment of FM Channel 271A to Gould, Arkansas, as that community's first local broadcast service, and its deletion from Mound Bayou, Mississippi, where it is unoccupied and unapplied for. Channel 271A can be allotted to Gould in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules if the channel is removed from Mound Bayou. Petitioner states that it will apply for the channel, if allotted.

2. Channel 271A was allotted to Mound Bayou in MM Docket No. 84-231 and no applications were filed by the close of the filing window on May 5, 1988. However, we have determined that it is not necessary to delete the Mound Bayou allotment in order to provide Gould with its first local broadcast service. A staff engineering analysis reveals that Channel 273A can be allotted to Gould in compliance with the minimum distance spacing requirements without the imposition of a site restriction.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 273A to Gould, Arkansas, since an interest has been expressed in providing the community with its first local broadcast service. Accordingly, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Gould, Arkansas	--	273A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Arkansas Radio Company
Attn: J. Boyd Ingram
P.O. Box 73
Batesville, MS 38606

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 273A at Gould are 33-59-00 and 91-33-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-286

In the Matter of

Amendment of Section 73.202(b), RM-6609
Table of Allotments,
FM Broadcast Stations.
(Baker, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 1, 1989; Released: June 21, 1989

By the Chief, Allocations Branch:

1. Mount Wilson FM Broadcasters, Inc. (petitioner) has filed a petition for rule making seeking the allotment of Channel 268B to Baker, California, as a first local broadcast service. Petitioner states that it will apply for the channel, if it is ultimately allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that channel allotments be distributed fairly, efficiently and equitable " . . . among the several States and communities." Communities are defined by the Commission as geographically, identifiable population groupings. As a general rule, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Baker is not listed in the U.S. Census or incorporated.[1] In the absence of such factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, AL*, 46 FR 58688, December 3, 1981; *Cascase Village, CO*, 48 FR 19917, May 3, 1983, and *Ellwood, CA*, 50 FR 13031, April 2, 1985.

3. Petitioner acknowledges that Baker is not incorporated but states that the 1988 *Rand McNally Commercial Atlas and Marketing Guide* attributes it with a population of 650.[2] Further, petitioner advises that Baker is the only source for essential services (food, clothing, home supplies, auto repairs, etc.) within a radius of 50 miles. Additionally, petitioner states that Baker contains "its own Sheriff's office with two resident deputies, a fire station, an emergency medical unit, a post office with its own zip code . . ., a Chamber of Commerce, a bi-weekly newspaper, three schools, two churches and shopping facilities." Therefore, based on petitioner's presentation, we shall propose the allotment to Baker.

4. A staff engineering analysis reveals that Channel 268B can be allotted to Baker consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction. [3] However, since Baker is located within 320 kilometers (199 miles) of the Mexican border, the Commission must seek concurrence of that Government in this proposal.

5. In consideration of the above, we believe it is appropriate to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Baker, California, as follows:

	Channel No.	
City	Present	Proposed
Baker, California	--	268B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert B. Jacobi, Esq.
Cohn and Marks
1333 New Hampshire Ave., NW
Washington, DC 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Baker is listed in the 1988 Edition of the Rand *McNally Commercial Atlas.* However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] Petitioner claims that the *Rand McNally* source dates back to 1982, and estimates that the current population of Baker is approximately 800.

[3] The coordinates for this proposed allotment are 35-15-54 and 116-04-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-287

In the Matter of

Amendment of Section 73.202(b), RM-6605
Table of Allotments,
FM Broadcast Stations.
(Valley, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; Released: June 21, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Royal Broadcasting Company, Inc. (petitioner) seeking the allotment of FM Channel 257A to Valley, Alabama, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel, if allotted.

2. A staff engineering analysis reveals that Channel 257A at Valley conficts with a proposal in MM Docket No. 88-499 to allot Channel 257C2 to Lumpkin, Georgia.[1] The distance between the two proposals is 110.3 kilometers whereas a separation of 163 kilometers is required between Class A and C2 co-channels. Thus, we sought an alternative channel for Valley. As a result, we have determined that Channel 251A can be allotted to Valley consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is restricted to an area at least 12.2 kilometers (7.6 miles) north[2] of the community to avoid short spacing to Station WAGH(FM), Channel 252A, Fort Mitchell, Alabama. [3]

3. In view of the fact that Valley could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Valley, Alabama	--	251A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

M. Scott Johnson, Esq.
Catherine M. Grofer, Esq.
Gardner, Carton & Douglas
1000 Pennsylvania Ave., NW
Suite 750
Washington, DC 20004

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the proposed site for Channel 257C2 at Lumpkin, Georgia, are 31-54-30 and 84-54-38.

[2] Coordinates at the restricted site for Channel 251A at Valley are 32-55-27 and 85-12-48.

[3] Coordinates at the licensed site of Station WAGH(FM) are 32-21-48 and 85-03-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-288

In the Matter of

Amendment of Section 73.202(b), RM-6608
Table of Allotments,
FM Broadcast Stations.
(South Lake Tahoe, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; Released: June 21, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Daniel S. Tankersley (petitioner), requesting the allotment of Channel 268A to South Lake Tahoe, California, as that community's third local FM service. Petitioner represents that he will apply for the channel if it is ultimately allotted.

2. A staff engineering analysis reveals that Channel 268A can be allotted to South Lake Tahoe, California, in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1]

3. In consideration of the above, and since the proposal could provide a third local FM broadcast service to South Lake Tahoe, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
South Lake Tahoe, California	230B1,275C2	230B1,268A, 275C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner and his consultant, as as follows:

Daniel S. Tankersley
707 Geneva Street
Opelika, AL 36801
(Petitioner)

Larry G. Fuss
P.O. Box 4010
Opelika, AL 36803
(Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 268A at South Lake Tahoe are 38-56-30 and 119-58-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-289

In the Matter of

Amendment of Section 73.202(b), RM-6680
Table of Allotments,
FM Broadcast Stations.
(Syracuse, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; Released: June 21, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of William A. Dixon (petitioner) proposing the allotment of FM Channel 278A to Syracuse, Indiana, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis reveals that Channel 278A can be allotted to Syracuse, Indiana, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. In view of the fact that Syracuse could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Syracuse, Indiana	–	278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert G. Allen, Esq.
Stephen E. Coran, Esq.
McCabe & Allen
P.O. Box 2126
Manassas Park, VA 22111

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 278A at Syracuse are 41-25-40 and 85-45-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-495

In the Matter of

Basic Exchange Telecommunications Radio Service — RM 5442

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: May 22, 1989; Released: June 21, 1989

By the Commission:

1. Pacific Bell and Nevada Bell (the "Pacific Companies") and the United States Telephone Association ("USTA") have each filed a separate petition for reconsideration of the *Basic Exchange Telecommunications Radio Service* [1], Report and Order, 3 FCC Rcd 214 (1988) (hereinafter " *Report and Order* ").[2] There were several responsive pleadings filed; the parties responding to the instant Petitions are listed in Appendix 1.

2. The Pacific Companies request that we reconsider that portion of the *Report and Order* which permits applications for the private radio frequencies allocated to BETRS (*see* note 2, *supra)* only for those locations 100 miles or more from the top 54 Standard Metropolitan Statistical Areas (SMSAs). Referring specifically to the eligibility of applicants in California, the Pacific Companies argue that many areas within a 100-mile radius of the large California cities (*e.g.*, Los Angeles, San Francisco, and San Jose) are sheltered from potential interference by mountainous terrain. Accordingly, the Pacific Companies argue that we should adopt a flexible waiver policy and grant applications for BETRS use of the private radio frequencies within 100 miles of the largest SMSAs if such applicants can "demonstrate, with sound engineering showings, based on terrain conditions, an absence of objectionable interference."

3. USTA argues 1) that we should designate additional spectrum to be used in cases in which the assigned frequencies are unavailable or insufficient; 2) that we should allow BETRS licensees to operate on private radio channels within the 100-mile radius of a top 54 SMSA when such facilities can be built and engineered to avoid interference; 3) that we should require the submission of all data necessary for frequency coordination from existing Rural Radio Service licensees; 4) that pending submission of such data, we should adopt rules substantially similar to Section 21.100(d) "to foster the expeditious resolution of any interference problems among co-channel users;" [3] and 5) that we should streamline Commission processing of BETRS applications for private radio frequencies "to avoid the delays inherent in a multiple review process." These arguments are discussed in detail below.

I. Additional Frequency Assignment

A. Position of the Parties

4. In support of its request for an additional frequency allocation to serve areas in which none of the designated frequencies are available, USTA argues that initial analyses undertaken by some of its members indicate that "targeted communities" will not be able to receive BETRS service because of limited availablity of allocated frequencies. While USTA did not specify which frequency band should be used or an amount of spectrum which should be allocated, other commenters did make such recommendations. Boeing, Rockwell, IMM, and OPASTCO argue that an additional, discrete frequency allocation of two megahertz is essential to the development and future evolution of BETRS. In particular, manufacturers Boeing and Rockwell indicate that in order to develop equipment which will carry more than one voice channel on each two-way radio channel, they need a wider bandwidth than that available on the conventional mobile UHF and VHF channels. Accordingly, they argue, the Commission should make contiguous spectrum available for BETRS so that manufacturers and licensees could have channels of a bandwidth adequate for the BETRS equipment they hope to develop. These commenters suggest that two megahertz of the General Mobile Reserve Allocation should be dedicated to BETRS.

5. Commenters opposing the allocation of additional spectrum for BETRS include Southwestern Bell, Telocator, Motorola, and NABER. These parties point out that USTA and its supporting commenters have not shown any specific areas which could benefit from BETRS or any subscribers who want BETRS where frequencies are unavailable. At best, they argue, an additional allocation is premature. NABER argues that one consideration in allocating new spectrum should be whether a radio frequency is necessary, or whether wireline is a practical substitute. Motorola argues that in view of the unclear demand for BETRS, a discrete frequency allocation is not appropriate. Motorola and Telocator suggest that cellular spectrum may be a practical alternative for BETRS.

B. *Discussion*

6. In the *Auxiliary Cellular Services Order*, (*see* note 1, *supra),* we authorized fixed cellular service as "an extension of basic exchange service in areas where there is inadequate or no basic exchange service." 3 FCC Rcd at 7041. Because of the basic exchange nature of this service authorization, and its dependence on state regulation of basic telephone service, this service is also called BETRS. 47 C.F.R. Section 22.2. Because of our action in that Order, we conclude that allocation of additional spectrum for BETRS is unnecessary. Cellular spectrum is a source of an abundant number of channels and may be particularly useful in rural areas to construct BETRS systems. We have begun licensing cellular operators in Rural Service Areas (RSAs) and plan to complete RSA licensing within one to two years.

7. We note that DPCRTS channel bandwidth is 30 kilohertz, compared with 25 kilohertz in the UHF conventional mobile band. Outside the largest cities there should be many cellular channels available for fixed service to BETRS subscribers. Moreover, with frequency reuse and appropriate engineering safeguards, it should be possible to make contiguous frequencies available. Both of

these qualities answer the Petitioners' rationale for discrete BETRS spectrum. Thus, we are not pursuaded that petitioners have justified the allocation of a discrete block of additional frequencies for BETRS.[4]

8. This is particularly true in view of the fact that parties requesting additional allocations have not indicated the location or number of subscribers they hope to attract with a BETRS service. In any event, there is a wide variety of frequencies and technologies available for use in providing rural telephone service. The varying rural conditions, such as distance from a Central Office, terrain, subscriber location and density, proximity to urban areas, and environmental factors which face rural telephone companies require, in our opinion, a flexible approach. Accordingly, we view the wide variety of possibilities for resolution of these problems as being beneficial to the rural public's interests. Thus we disagree with Boeing, Rockwell, and IMM who insist that the only method of obtaining universal telephone service is a separate and discrete block of spectrum for development of dedicated BETRS technology.

II. Private Radio Allocation to BETRS

A. *Positions of the Parties*

9. In the *Report and Order*, we made fifty pairs of two-way mobile private radio frequencies available for BETRS on a co-primary basis. The frequencies are not available within 100 miles of the border of the largest 54 MSAs (as calculated for cellular licensing; *see* Section 22.903(e) of the Rules.) Petitioners raise two issues pertaining to the private radio frequency allocation to BETRS. First, USTA, the Pacific Companies, and supporting commenters argue that the Commission should consider applications for BETRS within 100 miles of the top 54 MSAs if it can be demonstrated that no harmful interference will result to existing licensees. (The Pacific Companies request a formal flexible waiver policy be adopted by the Commission.) Second, USTA and supporting commenters are concerned that applications for private radio frequencies will be delayed because they will be processed by both the Common Carrier Bureau and Private Radio Bureau. They suggest a special streamlined procedure, *e.g.*, that a special task force dedicated to processing such applications be formed.

10. Private radio interests commenting on the first issue are opposed to loosening the standards for waiver of the 100-mile limitation around the largest 54 MSAs. They cite their expectations that need for private radio frequencies will increase in and around areas of urban growth in the coming years. NABER suggests that "there should not be a standard criteria for rule waivers to serve such areas." It proposes alternative waiver standards as follows:

> [T]he prospective BETRS licensee should be required to demonstrate to the Commission that: (1) the area is not adequately served by current telephone service; (2) the area cannot be economically served (over the long term) by landline telephone because of terrain or lack of population; (3) a grant of the application would not preclude private land mobile use of 800 MHz frequencies in the same areas as well as in nearby growing population centers; and (4) other frequency options are not available. (NABER Opposition at page 15.)

B. *Discussion*

11. We decline to alter our present standards for granting waiver requests. Petitioners have not demonstrated that our present waiver standards would not adequately balance the needs of private radio mobile users and potential BETRS subscribers.[5] Our present standards are such that all relevant factors would be taken into account on a case-by-case basis should a waiver of the 100-mile rule be requested. Accordingly, both Pacific Companies' request for a formal flexible waiver policy and NABER's proposal for waiver standards are rejected.[6]

12. Our internal processing of potential BETRS applications should not be a source of concern to applicants. To ensure consistent decisionmaking in compliance with Commission policies on BETRS, applications for BETRS on private radio frequencies will be forwarded to the Common Carrier Bureau. The Common Carrier Bureau will coordinate such requests with the Private Radio Bureau. Moreover, such coordination is necessary because Private Radio Bureau is in the best position to coordinate BETRS use of private radio frequencies with other uses of such frequencies under its jurisdiction. We do not anticipate any substantial increase in processing time as a result of coordination with the Private Radio Bureau. Moreover, the volume of BETRS applications we expect does not justify establishing a separate staff or task force to process these applications. Therefore, we decline to change our processing in the manner suggested by commenters.

III. Conventional Mobile Frequency Allocation to BETRS

A. *Position of the Parties*

13. One of the findings in our *Report and Order* was that we would not require existing RRS licensees to submit Section 22.15 information regarding their existing licensed stations, but that we would require such licensees to provide engineering information to would-be co-channel applicants.[7] USTA, BellSouth, and Contel Corporation argue that in the absence of a rule provision, RRS licensees cannot be counted on to give this frequency coordination information to requesting parties. USTA argues that we "should not leave potential BETRS licensees at the mercy of current co-primary licensees who can now ignore the need for speedy and effective responses to requests for information." (USTA Petition at 12.) These commenters request that we require all data necessary for frequency coordination to be put on file by existing RRS licensees, either immediately or when the licensees apply for renewal of their licenses. Moreover, pending receipt of such information, USTA and others argue that we should adopt rules substantially similar to those now applied to point-to-point microwave applicants (Section 21.100(d) of the Rules, *see* note 3, *supra).*

B. *Discussion*

14. In our *Report and Order*, we declined "to require existing RRS stations to provide Section 22.15 information because commenters have not shown that there will be enough co-channel stations inside the geographic separation areas of existing RRS stations to justify this requirement." 3 FCC Rcd at 218. USTA and its supporting commenters have not shown that this finding was incorrect. Their only argument is an unsubstantiated allegation that RRS licensees might ignore requests for frequency coordination information. We have not re-

ceived any complaints from applicants or potential applicants that this situation has occurred, nor do we expect it to occur.[8] Moreover, it would severely strain our limited resources if all RRS licensees were to file technical information for each of their stations all at once. SWBC has pointed out that private companies have such information available on an up to date basis, so applicants also have this alternative available.

15. Finally, at this time we will not consider other arguments concerning the advisability of adopting provisions similar to those in Section 21.100(d). The staff is currently considering a number of possible methods of resolving potential frequency conflicts for mobile services frequencies generally and the provisions of Section 22.100(d) and 21.100(d) are among these alternatives. Accordingly, it would be premature for us to give specific consideration to USTA's proposal now. In the near future we will address this question in a Rule Making proceeding.

IV. Conclusions

16. This Commission is committed to making affordable, basic telephone service available to every citizen who wants it. BETRS is an important means to that end. However, an additional discrete portion of the spectrum has not been shown to be necessary to the goal of universal service. Accordingly, we again decline to dedicate a discrete block of frequencies to BETRS. Although petitioners have mentioned areas in which some of the allocated common carrier and private radio frequencies are not available, they have not shown that there are any potential BETRS subscribers in those areas. None of the petitioners or commenters on reconsideration has given this Commission a reasonable demand study for BETRS, nor has one of them identified the locations of such persons. Without such detailed information in the record, we must find that there is no basis for dedicating 2 MHz of scarce radio spectrum to BETRS. On a practical level, it appears that there is a sufficient number of channels available for current demand. Moreover, we have begun licensing cellular operators in Rural Service Areas (RSAs) and plan to complete RSA licensing within one to two years. Cellular spectrum is a source of an abundant number of channels and may be particularly useful in rural areas to construct BETRS systems.

17. We further have found no support in the record for Petitioner's request for changing our existing waiver policies vis-a-vis the 100-mile radius from major cities which BETRS applicants for private radio frequencies must avoid. Finally, we have declined to change our ruling in the *Report and Order* to require that RRS licensees provide Section 22.15 information for existing stations to this Commission; we have, however, formalized the requirement, stated in our *Report and Order*, that RRS licensees must provide frequency coordination information to prospective applicants whose proposed systems may affect or be affected by the existing RRS system.

Paperwork Reduction Act Statement

18. The information collection contained herein has been analyed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Ordering Paragraphs

19. WHEREFORE, the foregoing premises considered, IT IS ORDERED that the Petition for Reconsideration filed by United States Telephone Association IS DENIED.

20. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Pacific Bell and Nevada Bell IS DENIED.

21. The effective date of the rule promulgated herein will be announced by public notice after the requisite approval of the Office of Management and Budget is received.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX 1

Parties Commenting in CC Docket No. 86-495 Reconsideration Petitions for Reconsideration:

Pacific Bell & Nevada Bell (the "Pacific Companies")

United States Telephone Association ("USTA")

Oppositions:

Land Mobile Communications Council ("LMCC")

Motorola, Inc. ("Motorola")

National Association of Business and Educatonal Radio, Inc. ("NABER")

Telocator Network of America ("Telocator")

Comments:

BellSouth Corp. ("BellSouth")

Boeing Electronics ("Boeing")

International Mobile Machines Corp. ("IMM")

Rockwell International ("Rockwell")

Southwestern Bell Corp. ("SWBC")

Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO")

Replies:

Telocator Network of America ("Telocator")

United States Telephone Association ("USTA")

Pacific Bell & Nevada Bell (the "Pacific Companies")

Southwestern Bell Corp. ("SWBC")

International Mobile Machines Corp. ("IMM")

APPENDIX 2

RULES SECTION

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303), Sec. 553 of the Administrative Procedure Act (5 U.S.C. 553), unless otherwise noted.

2. Section 22.609 will be amended by adding new paragraph (e) as follows:

Section 22.609 Supplementary showing required with applications for rural radio service.

* * * * *

(e) All licensees in the Rural Radio Service, must, upon request by a *bona fide* prospective applicant, provide to such applicant the information in subparagraph (d) of this part regarding the portion of the licensee's operations which potentially affects, or potentially is affected by, the prospective applicant's proposed system, if such information is not already on file with the Commission. This information must be given to the *bona fide* prospective applicant within thirty days of receipt of the information request.

FOOTNOTES

[1] Basic Exchange Telecommunications Radio Service (BETRS) is one of the public radio services available through the Rural Radio Service (RRS), 47 C.F.R. Part 22, Subpart H. "[T]his service provides public message communication service between a central office and subscribers located in rural areas." 47 C.F.R. Section 22.2 (Definitions). In addition, pursuant to *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 3 FCC Rcd. 7033 (1988) (hereinafter " *Auxiliary Cellular Services Order* "), BETRS is also defined as a service in the Domestic Public Cellular Radio Telecommunications Service (DPCRTS) which "provides public message communication service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas." *Id.*

[2] The *Report and Order* granted BETRS applicants co-primary access to the Very High Frequency (VHF or 150 MHz band) and Ultra-High Frequency (UHF or 450 MHz band) conventional mobile common carrier frequencies listed in 47 C.F.R. Section 22.501(a)-(b), and to 50 pairs of mobile frequencies from the private radio frequency allocations. The private radio frequencies to which BETRS applicants have co-primary access are listed in 47 C.F.R. Section 22.601(c) (as amended by the *Report and Order).*

[3] Section 21.100(d) requires potential applicants for microwave routes and existing licensees to negotiate a resolution of their frequency conflicts prior to filing an application with the Commission.

[4] Whether BETRS use must be routed through the cellular operator's central switch, or whether a separate, localized system could be created on a set of reserved frequencies, and whether subscribers will have to pay mobile rates for airtime are matters for the individual cellular operator and the state regulatory agency to decide. There is ample room for tailoring such systems to meet local requirements under the provisions of the *Auxiliary Cellular Services Order* so that grant of additional spectrum is not warranted.

[5] Section 22.19(a) of our Rules contains the showing we require to support a waiver request:

> (a) *Request for waivers.* (1) Waivers of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing: (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[6] NABER's proposed first, second, and fourth standards (*see* paragraph 11, *supra)* are in fact considerations which are presently taken into account in the normal application process for the Rural Radio Service. NABER's third standard is considered in the frequency coordination process as to existing licensees and applicants. However, to the extent NABER proposes to consider future private radio use in determining whether the BETRS applicant is permitted to use a private radio frequency, we decline to implement that proposal. The *Report and Order* made clear that the 50 pairs of private radio frequencies listed in Section 22.501(c) (as amended) are available on a co-primary basis. There is no support in the record for changing that decision.

[7] Section 22.15 of the Rules requires applicants to submit specialized engineering information which would allow prospective applicants to calculate interference parameters vis-a-vis existing stations.

[8] In the *Report and Order*, we indicated that we would require RRS licensees to supply information requested by potential applicants for BETRS frequencies. 3 FCC Rcd at 218. To the extent that statement appeared to require a petition to this Commission to acquire such information, we hereby clarify that impression. Upon request by potential BETRS applicants, RRS licensees are required to provide all information needed by the potential applicants for frequency coordination. Such requests should be honored within thirty days absent uniquely extenuating circumstances. Moreover, on our own motion we have reconsidered our decision not to amend the Rules to specify this responsibility on the part of RRS licensees. Accordingly, we herein amend Section 22.609 to include this requirement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

KERR COUNTY BROADCASTING	File No. BPH-860428ME ARN-850712P1
G & C MINORITY TELECOMMUNICATIONS, INC.	File No. BPH-860424MJ ARN-85071209

For a Construction Permit for a
New FM Station on Channel 221A
Kerrville, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1989; Released: June 20, 1989

1. The Commission has under consideration: (1) an Application for Review of the return subject application for a new FM station filed by Kerr County Broadcasting ("KCB"); (ii) an Application for Review of the return of the subject application for a new FM station filed by G & C Minority Telecommunications, Inc. ("G & C"); and (iii) two separate Oppositions to Applications for Review filed by Guadalupe Communications, Inc., permittee of Channel 221A at Kerrville, Texas. Because the legal issues and discussion presented in the KCB and G & C pleadings are virtually identical, the Applications for Review will be consolidated.

2. KCB and G & C both filed their applications on July 12, 1985. On March 24, 1986, the Chief, FM Branch, Audio Services Division, Mass Media Bureau, returned both applications as unacceptable for filing because the facilities specified exceeded the maximum height above average terrain ("HAAT") for Class A Stations within 199 miles (320 kilometers) of the Mexican border in violation of the 1972 Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band ("U.S. - Mexican Agreement" or "Agreement"). Specifically, Article 5 of the US-Mexican Agreement limits HAAT for Class A stations to 300 feet. KCB's application proposed an HAAT of 328 feet and G & C's application proposed an HAAT of 326.3 feet.

3. The March 24, 1986, letter returning the KCB and G&C applications also returned the application of Kerrville Radio Limited Partnership ("KRLP") for the same deficiency. KRLP applied directly to the Commission for review of the dismissal of its application. In its application for review KRLP charged that the Commission failed to give adequate notice of the technical requirements of the U.S. - Mexican Agreement and that under such circumstances applicants should be permitted to amend their applications to bring them into compliance with the terms of the Agreement. In denying review, the Commission held that the rules and processing guidelines governing FM broadcast applications contain several references to the Mexican and Canadian Agreements and advise applicants that the technical parameters of a station within 199 miles of the Mexican and Canadian borders may be restricted by the terms of the Agreements. *See* Kerrville *Radio*, 2 FCC Rcd 3441, 3442 (1987)[1] *see also* 47 C.F.R. §§ 73.204, 73.1650 and the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D). Thus, the Commission concluded that applicants had actual notice that stations within 199 miles of the Mexican border must conform with the requirements of the U.S. - Mexican Agreement. The Commission also rejected KRLP's effort to file an untimely amendment to correct the HAAT deficiency because the acceptance of such an amendment, in the absence of a showing of good cause for late filing, would inordinately delay the proceeding of applications and would undermine the purpose of the FM "hard look" processing rules.

4. On April 24, 1986 and on April 28, 1986, G & C and KCB, respectively, filed Petitions for Reconsideration of the dismissal of their applications. In their Petitions, KCB and G & C made many of the same argument advanced by KLRP concerning inadequate notice of the U.S. - Mexican Agreement restrictions. Additionally, however, KCB and G & C charged that the omission of subsections (b) (c) and (d) of 47 C.F.R. § 73.1650 (which pertain to International FM and TV broadcast station agreements) in the Pike and Fischer Radio Regulation ("Pike and Fischer") edition of the Commission's rules deprived them of notice of the Agreement and excused them from compliance therewith. To the extent G & C and KCB's charges had already been disposed of by the Commission in *Kerrville Radio*, the staff refused to give these matters any further consideration. With respect to the alleged omissions in the Pike an Fischer edition of the Commission's rules, the staff ruled that such omissions in an unofficial reporting system did not deprive applicants of notice of the Agreement. Accordingly, the staff denied reconsideration of both peitions on September 10, 1987.

5. In their respective applications for review G & C and KCB continue to assert that they lacked adequate notice of the provisions of the U.S. - Mexican Agreement. Specifically, G & C argues that the omission of subsections (b), (c) and (d) of § 73.1650 in the Pike and Fischer edition of our rules is material because Pike and Fischer is an official reporter of the Commission's rules and regulations upon which G & C was entitled to rely and that G & C therefore lacked notice of these pertinent subsections. Additionally, G & C argues that the staff's refusal to allow G & C to amend its application to bring it into compliance with the Agreement was arbitrary and capricious. KCB argues that the procedures prescribed by the Administrative Procedure Act ("APA") have not been complied with since the U.S. - Mexican Agreement rules has never been published in the Federal Register or incorporated into the published rules of the Commission. Thus, KCB claims that it never received adequate notice of the requirements of the Agreement. KCB further argues that noncompliance with provisions in the Agreement is not an acceptability defect but rather a grantability defect for which an amendment should be permitted; thus its application should not have been dismissed.

6. Notwithstanding G & C's claims to the contrary, we believe that G & C had adequate notice of the requirements imposed by the U.S. - Mexican Agreement. The fact that subsections (b), (c) and (d) of § 73.1650 were

omitted from the Pike and Fischer edition of our rules does not persuade us that G & C lacked notice of this rule. Citing 47 C.F.R. § 0.445, G & C asserts that Pike and Fischer is an "official source" of the Commission's rules and regulations upon which it is entitled to rely for notice of Commission requirements. While § 0.445(e) may allow parties to rely upon, use or cite as precedent, documents published in the Federal Register, FCC Record, FCC Reports or Pike and Fischer, this rule does not provide, as G & C suggests, that parties relying exclusively upon Pike and Fischer may disclaim having notice of any Commission requirement omitted from that publication. Section 0.445 simply implements §552(a) of the Administrative Procedure Act. 5 U.S.C. § 552(a). Both § 552(a) and § 0.445(c) provide for publication of rule making documents in the Federal Register. The omitted subsections of § 73.1650 were properly published in the Federal Register upon adoption. *See* 43 Fed. Reg. 45842 (1978). This publication thereby provides constructive notice of the rule, in its entirety, in accordance with the Administrative Procedure Act, 5 U.S.C. § 552(a). *See Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976) (publication of a regulation in the Federal Register is constructive notice of the contents of that regulation); *see also Go Leasing Inc. v. National Transportation Safety Board*, 800 F.2d 1514 (9th Cir. 1986) (publication of regulation in the Federal Register served legal function of notice required by Administrative Procedure Act, 5 U.S.C. § 552). Section 73.1650 also appears in its entirety in the Code of Federal Regulations. While G&C may choose to rely on the Pike and Fischer edition of the FCC rules, a publication over which the Commission has no control and for which it is in no way responsible, any errors or ommissions in that publication will not excuse G & C's failure to comply with any rule which has been properly promulgated and published pursuant to the Administative Procedure Act. Finally, we find contradictory G & C's claim that Pike and Fischer's ommission of certain subsections to § 73.1650 deprived G&C of notice of the U.S. - Mexican Agreement when G&C admits that Pike and Fischer has separately published an accurate version of the Agreement. *See* Rad. Reg. (P&F) Current Service | 41:335.

7. KCB also claims that the return of its application was improper because neither the U.S. - Mexican Agreement nor the ERP or HAAT restrictions contained therein have ever been published in the Federal Register in accordance with 5 U.S.C. § 552(a)(1). Section 552(a)(1) provides that substantive rules adopted by an agency shall be published in the Federal Register. Neither the U.S. - Mexican Agreement nor the ERP and HAAT restrictions contained therein were adopted by the Commission. The Agreement was adopted by the U.S. government, not the Commission. Thus, the Commission is not required to republish the Agreement before it can require applicants to comply with its terms. Furthermore, as we pointed out in *Kerrville Radio*, the Agreement takes precedence over the Commission's rules and the Commission has no power or authority to waive, modify or alter the terms thereof. However, among the general powers of the Commission enumerated in 47 C.F.R. § 303 is the power to make rules and regulations necessary to carry out the provisions of any international treaty. *See* 47 U.S.C. § 303(r). The Commission exercised this power in adopting and publishing in the Federal Register § 73.204 (International Agreements and other restrictions on use of channels) and § 73.1650 which explicitly states that the U.S. is a signatory to an agreement with Mexico concerning FM Broadcast stations and indicates where that agreement may be inspected or how it may be obtained. *See* 43 Fed. Reg. 45842 (1978) (adopting § 73.1650) and 49 Fed. Reg. 10264 (1984) (adopting § 73.204). In so doing, the Commission has met its obligation under the Communications Act and the Administrative Procedure Act.

8. Finally, both G & C and KCB argue that they should have been permitted to amend their respective applications to conform with the HAAT requirements of the U.S. - Mexican Agreement. Specifically, G & C argues that the Commission has never advised applicants that failure to comply with the HAAT limitations specified in the U.S. - Mexican Agreement renders an application unacceptable for filing and, therefore, return of G & C's application was arbitrary, capricious and an abuse of discretion. It is well established that amendments addressing the acceptability of an FM application are not permitted beyond expiration of the 30-day period triggered by a Public Notice announcing that the application has been accepted for tender. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19941 (1985). In discussing the elements evaluated in the course of an acceptability study under the "hard look" FM processing procedures adopted in the *Report and Order* in MM Docket 84-750, the Commission explicitly stated that "[i]nternational agreements also influence permissible ERP levels in border areas" and that "antenna height is also limited in certain cases by international treaty." *Id.* at 19946 (Appendix D). We do not believe, as G & C suggests, that failure to delineate the "certain areas" in which HAAT is limited by international agreement precludes return of an application as unacceptable for filing when the HAAT exceeds the limitations of an international agreement, particularly here where it is obvious that Kerrville, Texas, is a border community with Mexico or, at a minimum, is within a border area. On the contrary, having explicitly notified applicants that ERP and HAAT are evaluated in the course of an acceptability study and that ERP and HAAT may, in some cases, be limited by international agreements and, having provided explicit notice of those agreements, applicants are on notice that compliance with the ERP and HAAT limitations set forth in an international agreement is necessary to finding that an application is acceptable for filing. *See Kerrville Radio*, 2 FCC Rcd at 3442. KCB also asserts that because a member of the staff represented that compliance with international treaties was a grantability criteria (for which an amendment would be allowed or an issue specified in a Hearing Designation Order), KCB is entitled to rely on that representation and should be permitted to amend its application to correct the deficiency. Having properly notified applicants that compliance with the HAAT limitations in the U.S. -Mexican Agreement will be evaluated as an acceptability criteria, statements to the contrary by members of the staff do not warrant acceptance of a late filed amendment to cure an acceptability defect. It is well established that it is the obligation of interested parties to ascertain facts from offical Commission records and files and not rely on informal information from the staff. *See 220 Television, Inc.*, 81 FCC 2d 575 (1980); *Camelot, Inc.*, 61 FCC 2d 15, 38 RR 2d 620 (1976).

9. Accordingly, for the foregoing reasons, the Applications for Review filed by KCB and G & C ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] In *Kerrville Radio*, the Commission also denied review of the dismissal of an application filed by Susan Lundborg for a new FM facility on Channel 216A in Julian, California. Because KRLP and Lundborg's appeals raised virtually identical issues, the Commission consolidated consideration of their pleadings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lincoln Telephone and
Telegraph Company

Petition for Waiver of Part 69

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1989; Released: June 21, 1989

By the Chief, Common Carrier Bureau:

1. On May 10, 1989, the Lincoln Telephone and Telegraph Company (Lincoln) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a separate switched access rate element for the provision of exchange access for 900 Access Service.[1] The petition for waiver was filed concurrently with Lincoln's Transmittal No. 37, proposing to establish 900 Access Service,[2] scheduled to become effective June 24, 1989. Both the petition for waiver and the tariff filing are unopposed.

2. Lincoln states that it has received a customer request to provide 900 Access Service, and that the service offering will be available to all interexchange carriers (ICs), including AT&T, on an equivalent basis. It asserts that the calling party will use the same dialing pattern and receive the same connection and transmission quality, regardless of which IC receives the call. Lincoln's tariff filing proposes to revise its access tariff to establish initial nonrecurring charges (NRC) for the recovery of costs associated with the use of 900 NXX codes, and to establish a separate NRC for each additional NXX code installed with the same order.

3. The Bureau has reviewed Lincoln's petition for waiver and determined that the public interest would be served by permitting it to employ a separate rate element to recover the costs of providing 900 Access Service. We therefore grant Lincoln's request for waiver.

4. ACCORDINGLY, IT IS ORDERED that the petition for waiver filed by the Lincoln Telephone and Telegraph Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Lincoln Telephone and Telegraph Company, Petition for Waiver, filed May 10, 1989.

[2] The Lincoln Telephone and Telegraph Company, Transmittal No. 37, filed May 10, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

Docket No. 16679

In re Application of

RKO GENERAL, INC. (KHJ-TV)
Los Angeles, California

File No. BRCT-58

For renewal of Broadcast License

ORDER

Adopted: June 7, 1989; Released: June 20, 1989

By the Chairman:

1. The Commission has before it a Motion to Correct Transcript of Oral Argument filed June 2, 1988 by RKO General, Inc. This motion concerns an oral argument in this proceeding held April 28, 1988. The subject of the argument was RKO's basic qualifications to remain a Commission licensee of its several broadcast stations.

2. In Appendix A of the motion, RKO lists numerous proposed corrections to the transcript of the oral argument. RKO relates that counsel for all other parties participating in the oral argument either consent to the corrections listed or will interpose no objections. Good cause having been shown, we adopt Appendix A and correct the transcript accordingly.

3. In Appendix B of the motion, RKO amends a comment made by its counsel during the oral argument. Although RKO refers to this as a "correction," it is in the sense of correcting the substance of the comment, rather than of correcting the transcript. No objections having been raised, the Commission takes note of this matter.

4. ACCORDINGLY, IT IS ORDERED, Pursuant to 47 C.F.R. § 1.277(e), that the Motion to Correct Transcript of Oral Argument filed June 2, 1988 by RKO General, Inc. IS GRANTED and the corrections set forth in Appendix A of that motion ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick
Chairman

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. CSG-89-038-P/L

Application for authority to construct an international earth station at Ft. Belvoir, Virginia, for the provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: June 12, 1989; Released: June 22, 1989

By the Chief, International Facilities Division:

1. On January 18, 1989, GTE Spacenet Corp. (GTE), filed an application requesting authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Ft. Belvoir, Virginia, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on January 25, 1989. No comments were received. GTE has been granted blanket authority to establish and operate channels of communications between the U.S. and various international points for the provision of IBS.[1]

2. The proposed earth station will consist of an 8.1-meter antenna meeting INTELSAT Standard E-3 technical parameters, communicating with an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR) operating in the 14461-14479 MHz transmitting frequency band and the 11661-11679 MHz receiving frequency band also with receive channels centered on 11198 and 11452 MHz. The earth station will be constructed on customer premises at Ft. Belvoir, Virginia, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television service earth stations and multipurpose earth stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose earth stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. GTE's technical, and financial qualifications to construct and operate the proposed earth station are established. The applicant has been authorized to construct and operate other international earth stations.[5] GTE has completed the necessary frequency coordination for the frequencies listed in paragraph 2.

5. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a separate application for the additional authority.

6. Upon consideration of the application, we find that authorization of requested earth station facilities to provide IBS would serve the public interest.

7. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-89-038-P/L IS GRANTED, and GTE is authorized to construct and operate the proposed earth station at Ft. Belvoir, Virginia, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. Special Temporary Authority granted to GTE (CSG-89-038-P/L-T-1) on April 3, 1989, is hereby terminated.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* GTE Spacenet Corp., Mimeo No. 5606, released July 7, 1986, File No. ITC-86-097.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* GTE Spacenet Corp., DA 88-406, released March 29, 1988, File No. CSG-88-008-P/L.

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSMISSION AND RECEPTION SPECIALIST CO. — File No. I-T-C-89-090

Application for authority to establish channels of communication between the U.S. and INTELSAT Atlantic and Pacific Ocean satellites for the provision of International Television and INTELSAT Business Services.

Application for authority to construct and operate international earth station facilities at Sylmar, California, for the provision of International Television and INTELSAT Business Services. — File No. CSG-89-075-P/L

ORDER AND AUTHORIZATION

Adopted: June 12, 1989; Released: June 22, 1989

By the Chief, International Facilities Division:

1. The captioned applications, filed on April 17, 1989, by Satellite Transmission and Reception Specialist Co. (STARS), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to establish channels of communication between the U.S. and INTELSAT Atlantic and Pacific Ocean region satellites for provision of International Television and INTELSAT Business Services (IBS) between the U.S. and various overseas points, and to construct and operate international earth station facilities at Sylmar, California, for provision of International Television and IBS services. The applications were placed on public notice on April 26, 1989. No comments were received.

2. The proposed earth station will consist of an 11.1-meter antenna meeting INTELSAT Standard B technical facilities parameters, communicating with an appropriate INTELSAT satellite in the Pacific Ocean Region (POR) operating in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The earth station will be located at Sylmar, California, and will be used to provide a full range of IBS and television services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[1] In that Order, the Commission distinguished between IBS and/or television service earth stations and multipurpose earth stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose earth stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that, absent special problems, it would treat these applications as routine and expeditiously process them.[2] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[3]

4. STARS' legal, financial and technical qualifications to construct the proposed earth station are established. STARS has been authorized to construct and operate an earth station at Houston, Texas, for provision of IBS and television service.[4]

5. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS/television authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation and television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a separate application for the additional authority.

6. Upon consideration of the applications, we find that the public convenience and necessity require a grant thereof.

7. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-090 and CSG-89-075-P/L ARE GRANTED, and STARS is authorized to:

a. construct and operate an 11.1-meter C-band earth station at Sylmar, California,[5] to provide IBS and related video services and international television service; and

b. establish channels of communication between the U.S. and appropriate INTELSAT satellites for the provision of IBS and related digital services and international televison service between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services or international television service. Provided, however, that this blanket Section 214 application is without commitment as to the Commission's action on any earth station Title III applications that STARS may file in the future.

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. The Commission's Special Temporary Authority granted May 8, and modified on May 25, 1989, is hereby terminated.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreements between STARS and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

12. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[3] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[4] *See* Memorandum Opinion, Order and Authorization Mimeo No. 3173 released March 19, 1985, File No. I-T-C-85-070.

[5] This authorization is not to be construed as permitting the provision of IBS or television service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNITY EXCHANGE EXPRESS — File No. I-T-C-89-101

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 12, 1989; Released: June 22, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 27, 1989 by Community Exchange Express (CEE), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on May 3, 1989. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by CEE.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-101, IS GRANTED, and CEE is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, and Satellite Business Systems' Tariff F.C.C. No. 4 between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1,
Phase II

In the Matter of

Annual 1988 Access Tariff Filings

ERRATUM

Released: May 30, 1989

1. The Memorandum Opinion and Order released by this Commission in the above-captioned proceeding on April 27, 1989, FCC 89-131, is revised as follows:

2. In paragraph 3, the second sentence is revised to read:

> We also believe that Section 204(a) authorizes us to order refunds of decreased rates, but that we should not assert that authority in this proceeding in order to avoid protracted litigation over this controverted question.

3. In paragraph 7 and note 11, the citation is revised to read:

> *New England Tel. & Tel. Co. v. F. C. C.*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 57 U.S.L.W. 3703 (Apr. 25, 1989).

4. In paragraph 28, the second sentence is deleted.

5. In paragraph 50, the third sentence is revised to read:

> As discussed in paragraph 10, the LECs' claims regarding NECA's CCL rates are meritorious, and therefore no refunds related to rates filed by NECA are being ordered.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 22, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CNS AND COMPTEL PETITION TO MANDATE AVAILABILITY OF ESSENTIAL BILLING AND COLLECTION SERVICES AND ACCESS TO CALL VALIDATION DATA ON A JUST AND REASONABLE BASIS

On June 1, 1989, Capital Network System, Inc. (CNS), an interexchange carrier (IXC) that primarily provides operator-assisted service, and the Competitive Telecommunications Association (CompTel), a trade association representing IXCs, filed a petition requesting that the Commission require all local exchange carriers (LECs) that provide billing and collection services to AT&T to provide such services to all IXCs on a nondiscriminatory basis and at just and reasonable charges. CNS and CompTel also ask the Commission to require all LECs to make available to IXCs the data necessary for IXCs to validate LEC calling cards, as well as collect and third party calls. Alternatively, CNS and CompTel ask the Commission to initiate a Rule Making proceeding proposing rules to these ends.

CNS and CompTel state that most calls received by CNS are charged to LEC calling cards. They state that in order to receive payment for such calls, and for collect and third party calls, CNS and other IXCs that provide operator services for transient callers must be able to use LEC billing and collection services. Without such services, they state, they will be unable to bill the call since they will not know the name and address of the billed party. CNS and CompTel argue that even if IXCs were able to purchase the information necessary to bill the call themselves, it would be cost prohibitive for them to do so and to render a bill. Thus, they state, LEC billing and collection services are a practical necessity for the billing of "0" calls. CNS and CompTel also argue that call validation information is necessary so that IXCs can complete "0" calls without exposing themselves to the risk of fraud.

CNS and CompTel note that the United States District Court for the District of Columbia has required the Bell Operating Companies ("BOCs") and GTE to provide billing and collection services and call validation data to all IXCs on equal terms. They argue, however, that there is no similar requirement on the other LECs and that many such LECs do not provide such services or data to IXCs other than AT&T. Accordingly, they ask the Commission to extend the Court's requirements with respect to billing and collection services and call validation data to all LECs.

CNS and CompTel acknowledge that the Commission has detariffed billing and collection services, but argue that the Commission retained ancillary jurisdiction over this service and thus retained the authority to require that it be offered to all IXCs with operator services. They state that at the time the Commission detariffed billing and collection, AT&T was the only IXC that offered operator services, and that, consequently, issues relating to "0" services were not discussed in the record or considered in the order. They argue that "0" services present different issues from "1+" service because of the inability of IXCs to bill "0" calls by transient callers.

Interested parties may file comments on the CNS and CompTel petition by **July 17, 1989** and reply comments by **August 7, 1989.** Comments and reply comments should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554, and should reference RM-6785, the Rule Making number assigned to this proceeding. A copy of all comments and reply comments should also be sent to Gary Phillips, FCC, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commmission's contractor for public records duplication, International Transcription Services (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS by calling (202) 857-3800.

For further information contact Gary Phillips, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CINCINNATI BELL TELEPHONE COMPANY
Revisions to Tariff F.C.C. No. 35

Transmittal No. 518

ORDER

Adopted: June 13, 1989; **Released: June 14, 1989**

By the Chief, Common Carrier Bureau:

1. On March 17, 1989, the Cincinnati Bell Telephone Company (Cincinnati Bell) filed Transmittal No. 518, which proposes to implement pay telephone presubscription and preselection for its public and semi-public pay telephones. On April 3, 1989, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Transmittal 518; Cincinnati Bell replied on April 13. On April 18, Charter Network Company (Charter) filed informal comments in support of the Sprint petition.[1] The tariff revisions are currently scheduled to become effective on June 15, 1989.

2. Sprint objects to Cincinnati Bell's failure to release calling card validation data which it possesses as the billing and collection agent for American Telephone and Telegraph Company (AT&T). Sprint notes that AT&T calling cards are currently the only credit instruments available to Cincinnati's subscribers for 0+ calls made using Cincinnati Bell pay telephones.[2] Sprint predicts that interexchange carriers (ICs) other than AT&T will be forced to reject a significant amount of the payphone traffic because they lack the information necessary to verify AT&T calling cards. As a result, Sprint contends, AT&T will have an advantage over other carriers in Cincinnati Bell's payphone selection process. Sprint Petition at 2-3.

3. The validation data are not proprietary, Sprint maintains, because the relationship between Cincinnati Bell and AT&T is not that of principal and agent. *Id.* at 8-9. Even assuming that AT&T and Cincinnati Bell are principal and agent, Sprint continues, rejection of calling card traffic by ICs other than AT&T would inconvenience end users who are accustomed to having their cards accepted at Cincinnati Bell payphones. Sprint also observes that AT&T has used its exclusive ability to provide calling cards as a marketing tool, and maintains that AT&T's ability to do so will enable it to pay higher commissions on a broader base of traffic than other ICs. *Id.* at 11-12. Sprint further claims that Cincinnati Bell's offer to provide calling card services to Sprint and other ICs does not compensate for the advantage that AT&T will enjoy when balloting occurs, since new calling card arrangements cannot be implemented before balloting begins. *Id.* at 13.

4. Charter argues that as a result of Cincinnati Bell's refusal to disclose the validation data that it provides to AT&T, competitive ICs must choose to either forego all revenues from calls charged to Cincinnati Bell calling cards[3] or accept those cards at the risk of fraud. Even if other ICs are able to compete successfully for presubscription of Cincinnati Bell payphones, Charter asserts, they will be forced to assess higher rates for calls that they are able to bill and collect so as to offer competitive commissions to premises owners. Charter further argues that Cincinnati Bell "has actively used its monopoly relationship with local exchange service customers to solicit calling card accounts." Charter Comments at 2-3. Even if Cincinnati Bell could be considered AT&T's agent, Charter submits, it has engaged in an unreasonable and discriminatory practice. Charter maintains that Cincinnati Bell cannot cure such discrimination by offering to perform similar services for Sprint and other ICs. *Id.* at 3-4 & n.5.

5. Cincinnati Bell replies that the arguments advanced by petitioners are irrelevant to the Commission's review of its tariff since its proposed revisions do not relate to credit card validation. It suggests that petitioners instead raise the validation issue through the Commission's complaint process or in a petition for Rule Making. Even if the issue is properly the subject of a tariff proceeding, Cincinnati Bell asserts that it cannot release the requested validation data due to its contractual arrangement with AT&T. Cincinnati Bell repeats its offer to make calling card validation services available to Sprint if the IC wishes to contract for them. Cincinnati Bell Reply at 2-4. Cincinnati Bell also notes that some ICs and alternative operator service providers accept competitors' calling cards in connection with calls made from business and residential telephones. It further states that exchange carrier billing validation data that belong to Cincinnati Bell apart from its contract with AT&T will be made available to all ICs through US West Service Link. *Id.* at 4-5.

6. The Common Carrier Bureau has reviewed the tariff transmittal, the description and justification supporting it, and the pleadings. We cannot conclude at this time that the tariff revisions filed by Cincinnati Bell are patently unlawful so as to require rejection. We do conclude, however, that Sprint and Charter have raised sufficient questions regarding the lawfulness of Transmittal 518 to warrant suspension for five months and investigation. In an Order to be released shortly, we will designate the specific issues under investigation and establish a pleading cycle.

7. IT IS THEREFORE ORDERED that the petition filed against Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 518, by US Sprint Communications Company IS GRANTED to the extent set forth herein, and otherwise IS DENIED.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a), 205, the tariff revisions filed by Cincinnati Bell Telephone Company under Transmittal 518 ARE SUSPENDED for five months and an investigation is instituted into the lawfulness of the above-captioned tariff revisions.

9. IT IS FURTHER ORDERED that Cincinnati Bell Telephone Company shall be a party to this proceeding.

10. IT IS FURTHER ORDERED that Cincinnati Bell shall file a supplement reflecting the above suspension. For this purpose we assign Special Permission No. 89-415 and waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Charter, an interexchange carrier operating in Cincinnati Bell's service area, submitted a letter to the Commission after the April 3 filing deadline for petitions regarding Transmittal 518. Pursuant to Section 1.41 of the Commission's Rules, 47 U.S.C. § 1.41, the Bureau accepts Charter's letter as an informal comment.

[2] Cincinnati Bell does not issue its own calling cards, but uses AT&T calling cards for intralata calls. *See* Cincinnati Bell Reply at 3.

[3] *See* note 2, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-616

In the Matter of

Pacific Bell Directory
Petition for Special
Consideration on Audiotext
Gateway Market Trial

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1989; Released: June 22, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 28, 1989, Pacific Bell Directory (Pacific Directory)[1] filed a Notification of Market Trial (Notification)[2] and a Petition for Special Consideration (Petition)[3] for a limited market trial of an audiotex gateway (SMART Talk) in conjunction with Pacific Directory's printed yellow pages, beginning in June 1989. Pacific Directory intends to conduct a market trial of SMART Talk pursuant to the general conditions of the *Market Trial Order*,[4] but requests an extension of the trial period established in the *Market Trial Order* from eight to twenty months. In response to the Petition, two parties filed comments, two parties filed oppositions,[5] and two parties filed reply comments.[6] In this Order, pursuant to the authority delegated to us by the Commission,[7] we grant the Petition, subject to the conditions discussed below.

II. BACKGROUND

2. The *Market Trial Order* establishes conditions under which any Bell Operating Company (BOC) may conduct market trials of limited duration of specific enhanced services[8] without filing a Comparably Efficient Interconnection (CEI) plan as required in *Computer III*.[9] A BOC must satisfy the following conditions: 1) the market trial must be no longer than eight months;[10] 2) the costs of a market trial must be allocated in full accordance with approved Cost Allocation Manuals; 3) BOCs that conduct market trials must inform end user trial participants that services and prices available during the trial may not be available after the close of the trial; 4) competing enhanced service providers (ESPs) must receive equal access, at equivalent prices, for all basic network services used in the trial; 5) ESPs must be informed of a trial ninety days before it starts; and 6) the BOC must observe the customer proprietary network information (CPNI) rules and network disclosure rules of *Computer III*.

3. The *Market Trial Order* requires BOCs that conduct market trials pursuant to that order to notify us in writing ninety days before the proposed commencement of a market trial. This notification must describe the proposed market trial and explain how the waiver conditions will be satisfied. Unless we take action in response to the notification, the trial may commence at the end of the ninety day waiting period.[11] The *Market Trial Order* also specifies that market trials on different terms than those discussed above require a further petition for waiver of the Commission's rules.[12]

III. THE MARKET TRIAL

4. Pacific Directory, which publishes white pages and yellow pages directories, states that it plans to offer the SMART Talk gateway on a trial basis in Sacramento, California, beginning in June 1989, and in Riverside, California, beginning in August 1989.[13]

5. Pacific Directory states that it will assign to each of its yellow pages directories a different telephone number for an associated SMART Talk gateway that will be printed at the top of each page of the yellow pages directory. End users can dial this number to receive additional information about how to use the gateway to access audiotex information about a yellow pages advertiser. Yellow pages advertisers may include an additional four-digit number in their advertisements that callers can dial in conjunction with the SMART Talk main number to receive specific audiotex messages from the SMART Talk gateway.

6. Yellow pages advertisers may use gateways other than SMART Talk to provide information, and may advertise alternative audiotex gateway numbers in Pacific Directory's yellow pages. Any audiotex ESP may arrange with Pacific Directory to use the SMART Talk gateway to provide storage and retrieval services to Pacific Directory's yellow pages advertisers.[14] Advertisers or ESPs will pay an annual fee for inclusion on the SMART Talk gateway. Advertisers or other ESPs will be linked to the gateway through existing tariffed telecommunications services. Pacific Directory states that it will provide yellow pages advertisers with a list of ESPs on the gateway as well as services they provide. In addition, Pacific Directory plans to provide advertising consulting services to advertisers and ESPs for a flat fee.

7. The Notification states that Pacific Directory will comply with all aspects of the requirements of the *Market Trial Order*, other than the length of the market trial, which is addressed in the Petition, and describes in detail its proposed means of compliance.

IV. THE PETITION

A. *Description*

8. Pacific Directory requests a twenty-month trial period for SMART Talk, arguing that it needs this period because of the life cycle of its printed yellow pages directories, which remain in effect and are available for one year. Pacific Directory indicates that prior to the one-year period that SMART Talk numbers and information would appear in the yellow pages directories, it needs time to solicit orders for print advertising in the directories and to publish its directories after this marketing activity. The SMART Talk gateway would not be activated until the first yellow pages directories are distributed. Thus, the requested twenty-month trial period includes the time needed for sales of advertising and yellow pages publish-

ing as well as the one-year period during which the affected directories will be available. Pacific Directory argues that unless the standard eight-month trial period of the *Market Trial Order* is extended to include the full twelve-month life of the directory, customers will be confused because yellow pages directories will continue to list SMART Talk numbers to call even after the SMART Talk service has been disconnected at the end of the eight-month trial.[15] Pacific Directory contends that if the waiver is not approved and the trial is limited to eight months, the SMART Talk service effectively will be available for only one month, since the sales and publishing activities take approximately seven months. Thus, Pacific Directory states, without an extension, it would be unable to develop information that would enable it to determine whether and how to offer SMART Talk.[16]

B. ***Positions of the Parties***

9. USTA contends that, because Pacific Directory has shown a unique need for an extension of the trial period, we should grant the extended trial period. USTA argues that since the eight-month trial period provided in the *Market Trial Order* would allow the service to be publically available for only one month, customer confusion would result.[17] Moreover, USTA states that unless the trial period is extended, the purpose of the trial, to determine whether and how to offer SMART Talk, would be frustrated.[18] Similarly, SWBT argues that we should approve the twenty-month trial period for SMART Talk because "the relationship between the numbers to be printed in the directories and the function of the gateway itself make it necessary to conduct a trial of that duration in order to obtain results of any value."[19]

10. Dun & Bradstreet, however, argues that the proposed twenty-month market trial cannot be characterized as a simple market test, and that the requirement that Pacific Directory file a CEI plan is not so burdensome that it would be impractical. Dun & Bradstreet states further that tying the market trial of SMART Talk to what it describes as a monopoly product --yellow pages -- means that SMART Talk is not a limited offering.[20]

11. Yellow-Phone urges us to deny the Petition because it provides no new showing supporting special consideration,[21] since the Commission knew about the twelve-month life of yellow pages directories when it established the eight-month trial period.[22]

12. Pacific Directory contends in reply that parties do not provide any argument against the twenty-month period, but rather raise other issues, which Pacific Directory opposes, that were not raised in the Petition.[23]

C. ***Discussion***

13. We find that the requested twenty-month time period is justified for the SMART Talk market trial. As Pacific Directory argues, a shorter period would not enable it to acquire the type of information needed to determine whether and how such an enhanced service should be provided. An eight-month period would be insufficient to conduct the trial efficiently, especially since Pacific Directory states that it requires almost that long to solicit advertising for and publish the yellow pages directories. Moreover, customers might be confused if the SMART Talk numbers in a yellow pages directory were not valid for the life of the directory.[24] To reduce customer confusion caused by the use of old yellow page directories after the completion of the trial period, we require Pacific Directory to include a statement on the first page of each directory indicating that SMART Talk is a market trial and noting the date that the trial will terminate.

14. In the *Market Trial Order*, we contemplated possible extensions of the eight-month limitation when warranted.[25] The *Market Trial Order* states that a BOC that can demonstrate a unique need to conduct a trial in excess of eight months may request special consideration. Granting this waiver is consistent with our decision in the *Market Trial Order* to grant SWBT a waiver for a market trial period of twelve months.

15. We disagree with Dun & Bradstreet's contention that Pacific Directory should be required to file a CEI plan for SMART Talk, rather than conducting a market trial.[26] A major purpose of permitting such trials pursuant to the *Market Trial Order* is to allow the BOCs to obtain, through limited trials, the information they need to determine whether and how to provide enhanced services. Pacific has adequately shown that it will undertake such a limited trial. The requested time period for the SMART Talk market trial is consistent with that policy goal. Accordingly, we grant the waiver of the Computer II and III rules to permit the petitioner to conduct a twenty-month market trial for SMART Talk.[27]

V. ORDERING CLAUSES

16. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, Pacific Directory's Petition for Special Consideration IS GRANTED, subject to the conditions described herein.

17. IT IS FURTHER ORDERED, That Pacific Directory's Motion to Reject Pleading Filed Out of Time IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

Party Filing Market Trial Waiver Petition and Notification

Pacific Bell Directory (Pacific Directory)

Parties Filing Comments

American Newspaper Publishers Association (ANPA)

United States Telephone Association (USTA)

Parties Filing Oppositions

Dun & Bradstreet Corporation (Dun & Bradstreet)

Yellow-Phone Inc. (Yellow-Phone)

Party Filing Reply Comments and Reply to Opposition

Pacific Bell Directory (Pacific Directory)

Southwestern Bell Telephone Company (SWBT)

FOOTNOTES

[1] Pacific Directory is a subsidiary of Pacific Bell Telephone Company.

[2] Pacific Directory, Notification of Market Trial, February 28, 1989 (Notification).

[3] *Id.* at Exhibit 2.

[4] BOC Notices of Compliance with CEI Waiver Requirements for Market Trial of Enhanced Services, 4 FCC Rcd 1266 (Com. Car. Bur. 1989).

[5] Yellow-Phone filed its opposition after the conclusion of the pleading cycle established in this proceeding. Pacific Directory filed a Motion to Reject and a reply to Yellow-Phone's pleading; Yellow-Phone filed a Response to the Motion to Reject. We have decided to accept Yellow-Phone's and Pacific Directory's pleadings as *ex parte* filings and consider them on that basis. *See* Amendments of Sections 64.702, *Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 1150, 1169 n. 2 (1988).

[6] A list of commenters appears in Appendix A. The abbreviations used in the Appendix for the various parties appear throughout this Order.

[7] 47 C.F.R. Sections 0.91 and 0.291 (1987)

[8] We established the market trial requirements to enable the BOCs to test new services and technologies and to reduce administrative delays, while preserving our ability to examine and modify trial proposals. *Market Trial Order*, 4 FCC Rcd at 1272. The *Market Trial Order* also granted a waiver of certain CEI requirements to SWBT to allow it to conduct a market trial of voice and data gateway services for one year in Houston, Texas, beginning March 1, 1989.

[9] *See* Amendments of Sections 64.702 of the Commissions Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *affirmed on further reconsideration*, 3 FCC Rcd 1135 (1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987), *modified on reconsideration,* 3 FCC Rcd 1150 (1988).

[10] The *Market Trial Order* states that BOCs that can demonstrate a unique need to conduct a trial in excess of eight months, such as those that SWBT demonstrated for the Houston gateway trial, may request special consideration. *Id.*

[11] We may request more information, invite public comment, and attach further conditions regarding the trial, as necessary. *Market Trial Order,* 4 FCC Rcd at 1272, para. 47.

[12] *Id.*

[13] The gateway will be distinct from any other Pacific Telesis gateway offering. Notification at 5. While Pacific Directory will market the SMART Talk gateway service, the gateway equipment will be owned and operated by a third party provider. *Id.* at 9.

[14] Notification at 6.

[15] Petition at 3-4.

[16] *Id.* at 4.

[17] USTA Comments at 1-2.

[18] *Id.* at 2.

[19] SWBT Reply Comments at 3.

[20] Dun & Bradstreet Comments at 7. Dun & Bradstreet, Yellow-Phone, and ANPA also raise a number of issues not related to the proposed length of the market trial. ANPA argues, for example, that we need to examine the competitive issues associated with the market trial; Yellow Phone contends that Pacific Bell and Pacific Directory engage in discriminatory practices; and Dun & Bradstreet attacks Pacific Bell's plans for complying with our CPNI rules, including Pacific Directory's alleged refusal to provide subscriber lists to competitors, and its compliance with the Modification of Final Judgment consent decree.

[21] Yellow-Phone Comments at 1-2.

[22] *Id.* at 3.

[23] Pacific Directory Reply at ii.

[24] *See id.* at 7.

[25] *Market Trial Order,* 4 FCC Rcd at 1272, paras. 20-21.

[26] Parties also argue, for a number of reasons unrelated to the proposed length of the trial, that we should not permit Pacific Directory to conduct the SMART Talk market trial under the conditions described in the Notification. *See supra* note 20. We have considered these arguments and believe that the Notification and Pacific Directory's reply provide adequate assurance that the conditions of the *Market Trial Order,* other than the time limitation addressed in the Petition, are satisfied.

[27] Pacific Directory must notify us in writing of the actual start date of the market trial and the date of its completion.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-290

In the Matter of

Amendment of Section 73.202(b), RM-6607
Table of Allotments,
FM Broadcast Stations.
(Magnolia, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; Released: June 23, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Hogan Broadcasting System (petitioner), seeking the allotment of FM Channel 278A to Magnolia, Arkansas, as that community's second local FM broadcast service. Petitioner stated its intention to apply for the channel, if allotted.

2. A staff engineering analysis reveals that requested Channel 278A at Magnolia conflicts with a proposal to allot Channel 277C1 to El Dorado, Arkansas (RM-6406).[1] The distance between the two proposals is 28.1 kilometers whereas a separation of 129 kilometers is required between first adjacent Class A and C1 channels. Thus, we sought an alternative channel for Magnolia. As a result, we have determined that Channel 271A can be allotted to Magnolia consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is restricted to an area at least 10.8 kilometers (6.7 miles) north[2] of the community to avoid short spacing to Station KNOE-FM, Channel 270C, Monroe, Louisiana,[3] and to Station KOSY-FM, Channel 273C1, Texarkana, Texas.[4]

3. In view of the fact that Magnolia could receive a second local FM broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Magnolia, Arkansas	300C1	271A, 300C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 14, 1989,** and reply comments on or before **August 29, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Hogan Broadcasting System
Attn: Billy G. Hogan
Rt. 1, Box 183
Elkmont, AL 35620

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the proposed site for Channel 277C1 at El Dorado are 33-14-01 and 92-56-27.

[2] Coordinates at the restricted site for Channel 271A at Magnolia are 33-21-53 and 93-13-36.

[3] Coordinates at the licensed site of Station KNOE-FM at Monroe, Louisiana, are 32-11-45 and 92-04-10.

[4] Coordinates at the licensed site of Station KOSY-FM at Texarkana, Texas, are 33-22-24 and 94-01-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-35

In re Application of

SfB CORPORATION File No. BPH-860902MA

For a Construction Permit for a
New Station on Channel 295A in
Moultonborough, NH

Appearances

Vincent J. Curtis, Jr. appeared on behalf of SfB Corporation and *Larry A. Miller* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: June 12, 1989; Released: June 22, 1989

1. The application of SfB Corporation was designated for hearing along with four others which have been dismissed. SfB, the remaining applicant, requests a grant, but the following issues must be resolved in its favor before a grant can be made.

> To determine the facts and circumstances surrounding Werner E. Sievers' involvement in the affairs of SfB Corporation;
>
> To determine whether SfB Corporation lacked candor or misrepresented facts concerning Sievers' involvement in the affairs of SfB Corporation;
>
> To determine the interests held by J. Peter Hare and James W. Mardis in SfB Corporation;
>
> To determine whether SfB violated Section 1.65 and/or 73.3514 in failing to report to the Commission the nature of such interests;
>
> To determine whether SFB Corporation lacked candor or misrepresented facts concerning the nature of such interests;
>
> To determine in light of the evidence adduced pursuant to the foregoing issues, whether SfB is basically qualified to become a Commission licensee.

2. A prehearing conference was held on May 25, 1988. Hearing sessions were held on November 7 and 8, 1988. The record was closed on November 8, 1988. *Order*, FCC 88M-3817, released November 10, 1988. On November 25 and 30, 1988, SfB moved to correct the transcript. That request was granted and the record was certified on April 21, 1989. *Order*, FCC 89M-1250, released April 25, 1989. Proposed findings and conclusions were filed on December 22, 1988 and no replies were filed.

FINDINGS OF FACT

The Facts and Circumstances Surrounding Werner E. Sievers' Involvement in the Affairs of SFB Corporation

3. Werner E. Sievers has worked with G. Bradford Tiffany at the MITRE Corporation in Bedford, Massachusetts since 1961. SfB Exh. 3, at 1. Tiffany told Sievers some time in 1984 or 1985 that he intended to build a radio station in Moultonborough, New Hampshire. *Id.* From the outset, even before Tiffany petitioned for allocation of a frequency, Sievers discussed the economics of operating a station with Tiffany and indicated that he was interested in investing in the proposed station. *Id.*, at 2. When Tiffany decided that the name of corporation would be SfB, he told Sievers and, in 1985, when SfB was incorporated, Sievers became a director and vice president. *Id.* Sievers agreed to match half the contributions of Tiffany and his spouse in development of the proposal. *Id.* This arrangement was made, he said, because Tiffany wanted 51% of the stock. Tr. 52. It meant that Sievers would have a 25% interest and an obligation to contribute $13,000 for the stock. *Id.* Sievers believes that the value to be attributed to his share was calculated later by Tiffany when he was trying to decide what he could sell the remaining interest of 24% for. *Id.* On September 6, 1985, Sievers went with the Tiffanys to participate in the organizational meeting of SfB at the Laconia, New Hampshire law offices of attorney Rod Dyer.

4. After that meeting, Sievers periodically signed corporate resolutions. *Id.*, at 3. When a channel was allocated in 1986, Sievers also reviewed the application for the frequency, which Tiffany prepared. *Id.*, at 4. Tiffany kept Sievers informed with memos and an accounting of capital. *Id.* Sievers never replied in writing to Tiffany because the memos were hand delivered and discussed orally with him. On August 25, 1986, at the suggestion of communications counsel, Sievers resigned from his corporate director and officer positions and the corporation was reorganized into voting and nonvoting stockholders. *Id.* When that change was made Sievers signed a stock subscription agreement. *Id.*

5. Sievers claims that he never made any decisions about the proposal. *Id.*, at 5. He states that his only activity was to provide financial information to the bank. *Id.* He also attended a settlement meeting in Washington on May 23, 1988, provided answers to interrogatories and testified. *Id.* In general, he believes he has only looked after his investment. *Id.* The written testimony of G. Bradford Tiffany and his spouse, Oretta Jean Tiffany, confirms the essential facts provided by Sievers about his involvement in the affairs of SfB Corporation. SfB Exh. 4, at 3-4; SfB Exh. 5, at 3, 5, 9, 10-11, 12, 13, 14.

6. Oral testimony and documents add to the version provided by Sievers in writing. When questioned, Sievers frequently responded that he either could not recall what part he played in establishing SFB's proposal or he had none. But other documentary evidence shows that Tiffany routinely brought letters or memoranda to Sievers. Tr. 60. And those letters and memoranda establish that Tiffany consulted with Sievers about nearly every aspect of the station proposal. On June 21, 1985, Tiffany delivered to Sievers legal paperwork for his review. MMB Exh. 1. Tiffany wrote to Sievers, on July 8, 1985, about their joint concept for making the station commercially viable. MMB Exh. 2. Sievers denies that the concept was in any part his and he claims that the weekly or biweekly discus-

sions with Tiffany were one way discussions in which Tiffany did all the talking. Tr. 60. Sievers was permitted to authorize deposits and withdrawals from SfB's bank account; and he was aware that he had that authority. MMB Exh. 4; Tr. 66.

7. Sievers also was consulted about the applicant's business plan and strategy for raising additional capital. MMB Exh. 5. Although he claims he provided no help. In Tiffany's memoranda, Sievers is described as a promoter of the station and as someone who is aware of that characterization. Tr. 75; MMB Exhs. 7 and 8. In fact, he suggested to Tiffany that additional investors should be sought at a later time. In that way, he believed, they could be required to pay more for joining in the proposal. Tr. 76. When communications counsel suggested that SfB should be reorganized into voting and nonvoting shareholders, the Tiffanys urged that the nonvoting shareholders should have the right of first refusal for the voting shares. MMB Exh. 12. The changes in ownership and denominating Sievers, Hare, and Mardi's nonvoting shareholders was made in order to maximize the comparative standing of SfB. Tr. 91.

8. There is evidence that after the decision was made to make Sievers an inactive or insulated investor, he voted on all matters that arose at the September 2, 1986 board and stockholders meeting where his resignation was accepted. MMB Exh. 14; Tr. 96, 97. Moreover, after he resigned from the board, Tiffany continued to bring Sievers memoranda about the proposal. Tr. 98. Tiffany did not provide the memoranda to the two other subscribers to nonvoting stock. Tr. 99. After the change in ownership, Sievers advised Tiffany about settling the case and attended a settlement meeting with counsel in Washington, D.C. MMB Exh. 17, Tr. 102, 103, 123.

9. Sievers was usually shown filings in the case and he was aware that his appearance at a deposition had been requested. Tr. 108, 109, 110, 111. He also answered interrogatories. MMB Exh. 18, Tr. 114. He is still receiving memoranda from Tiffany and being kept informed about the proposal by him. Tr. 120.

10. John Tierney, who represented SfB during the proceeding, states that he was unaware of Sievers' participation. He drafted the answers to interrogatories where SfB claimed that Sievers took no part in the company. Tr. 182. Tierney claims he failed to focus on Sievers' role when he wrote the opposition to the notice of deposition. Tr. 308-09, 310. He failed to consider, although he knew, that Sievers had been a director and voting shareholder. Tr. 314. But Tierney represents that he was not aware that Tiffany and Sievers routinely consulted about the business of SfB. Tr. 317-18. In part this was because Tiffany had told Tierney, in the summer of 1986, that Sievers was not going to have anything to do with the operation of the station. Tr. 318. And he relied on Tiffany to provide information about Sievers. Tr. 322. The numerous memos that Tiffany sent to Sievers were not revealed to Tierney until they were produced during discovery. Tr. 322. Tierney testified that he was unaware that they were still being provided. *Id.* However, when Tierney opposed the deposition of Sievers, he did know that Sievers had attended settlement discussions and had participated in the discussions. Tr. 337, 340.

11. When SfB represented that Sievers had not been involved in the operation of the corporation, Sievers and Tiffany knew that the representation was inaccurate. Tr. 149. Tiffany contacted Tierney and told him that Sievers had been an officer, director, and voting stockholder. *Id.* They discussed changing the pleading. *Id.* Tiffany, however, knew that Tierney was already aware of Sievers' involvement because he told Tierney about it in the summer of 1986. That revelation led to Tierney's proposal to change the corporation to make the Tiffanys the only voting stockholders. Tr. 145, 146, 170.

12. While Tierney was made aware that the opposition to Sievers' deposition was inaccurate, he only learned of it on April 19, 1988 and the following day Hoover corrected the inaccurate representations in his reply. Tr. 333. Tierney represents that he never intended to mislead. Tr. 325.

The Ownership Interest of SfB's Investors

13. James W. Mardis and J. Peter Hare are SfB stock subscribers. Tr. 130, 131. They have put 10% down ($540) and the stock will be issued 'when the CP is granted. *Id.* If there is no grant, their deposits will be returned. *Id.* The interest attributed to Hare in the application was inaccurate in two respects. It incorrectly listed the percentage of interest he would have and it incorrectly claimed that he owned the stock when he was actually only a subscriber. Tr. 135-36. The application also failed to identify that all the other owners were subscribers, at least in part. Tierney cannot explain how it became inaccurate. He testified that the original draft, which he prepared and sent to Tiffany, was correct in the amount of stock that Hare would eventually own. Tr. 335. Tiffany intended the ownership listed on the application to reflect how the ownership would be following a grant. Tr. 176.

14. Tiffany said he did not know whether he told his counsel that the stock of Hare and Mardis was only subscribed. Tr. 139. Tierney, however, remembered Tiffany showing him the stock subscription agreements. Tr. 326. Tierney stated, however, that he was not aware that the Tiffanys and Sievers were also partial stock subscribers. Tr. 327, 334. It is Tierney's belief that stock subscription agreements were not contracts or agreements that needed to be reported to the Commission. Tr. 330, 331, 332.

CONCLUSIONS

Werner Sievers' Involvement in the Affairs of SfB Corporation and SfB's Representations About His Involvement

15. Hoover gave notice to SfB on April 6, 1988 that it would depose Werner Sievers. Sievers was then a nonvoting stockholder in SfB. SfB opposed Hoover's request because it then claimed that Sievers "is neither an officer nor a director of [SfB] and has never had and never will have an active role in the management and/or operation of the corporation." Opposition, filed April 14, 1988 by SfB. The facts as the applicant's principal, Bradford Tiffany, and its counsel, John Tierney, testified, did not coincide with SfB's opposition to the deposition. In addition SfB answered interrogatories that did not accurately reveal Sievers' actual participation. Sievers had been an officer and director when SfB was organized. He also voted on organizational matters and had a right to sign checks and make deposits to SfB's bank account. It was not until the application was being prepared that Tierney suggested to Tiffany that SfB should be reorganized to limit Sievers to a nonvoting interest since he was

not proposed for integration into the daily operation of the station and his voting interest would dilute SfB's comparative standing.

16. The testimony establishes that Tiffany always consulted Sievers about his plans. Sievers maintains that he just listened and did not help make decisions. Contemporary documentary evidence and oral testimony shows that long memoranda were prepared by Tiffany for Sievers and that Tiffany always brought them to Sievers and then discussed them with him. Sievers' advice was sought out on how to establish the proposed station as a viable commercial entity. He agreed to a method for financing the company. He also reviewed the application and filings made to the Commission by SfB. There is little question that Sievers' previous position in the corporation, his close association with Tiffany, his financial interest, and his routine involvement in corporate affairs would have warranted his deposition.

17. Tierney now concedes that the representation in the opposition was not accurate and Tiffany and Sievers testified that they knew as soon as they read the opposition that it was inaccurate. Tiffany told Tierney immediately after receiving it that it was not correct. Tierney said he did nothing to inform the Commission because he knew Hoover's response would point out the reasons why the request for a protective order was factually inaccurate.

18. "[M]isrepresentation and lack of candor in an applicant's dealing with the Commission" are viewed "as serious breaches of trust." *Character Qualifications*, 102 F.C.C. 2d 1179, 1211, *recon. denied*, 1 F.C.C. Rcd 421 (1986). "The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." *Id.* The purpose of the designated factual character issues is to make a predictive judgment relating to the applicant's propensity to deal honestly with the Commission and to comply with its rules and policies. SfB misrepresented facts about Sievers' role in the applicant. While it argues that the Commission could have determined the true facts either from the opponent, Hoover, or from official records in New Hampshire, that is no answer at all to its action in withholding the truth. SfB's principals were not directly at fault, however. It was counsel's unthinking and false advocacy that resulted in the misrepresentations. SfB's Tiffany immediately called some of the inaccuracies to counsel's attention and counsel used bad judgment. It was counsel's view that he could rely on Hoover, the opposing applicant, to set the record straight. In fact, his reasoning was flawed since once the facts were set right, the Commission was still faced with SfB's unretracted argument that Sievers' should be protected from having to appear. Tiffany should have been more insistent with his counsel but there is no doubt that he was concerned and he did not want the untruthful statement to go uncorrected. Sievers also believed the matter should have been corrected. If the principals of SfB are left to their own judgment, it appears that they will deal honestly with the Commission.

19. SfB and the Bureau urge that Sievers is not an active principal in the applicant. The facts do not support that conclusion. But, it is a conclusion that need not be reached because the issue is whether SfB accurately represented the full facts about his participation when it requested a protective order and answered interrogatories; there is no question that it did not. Moreover, the applicant knew its representations were inaccurate. While counsel acted on his own, with the applicant's principals reviewing the filing, he knew that what he represented was not accurate. Instead, both counsel and Tiffany based their decision to avoid discovery on their view of the conclusions to be drawn from all of the facts; and once they reached that conclusion, they attempted to keep damaging facts, which did not support their view, from Commission scrutiny.

The Interests Held by J. Peter Hare and James W. Mardis

20. SfB reported in its application that Hare and Mardis owned nonvoting stock and that there were no agreements about ownership to report. SfB was also specifically directed to report subscription agreements when it filed its integration statement but it did not. Two years after its application was filed SfB revealed in a pleading that Hare and Mardis were subscribers and there were subscription agreements. Hoover pointed out in raising this issue, that SfB's failure to report these matters resulted in its not questioning SfB about the subscriptions and their impact on SfB's proposal during discovery. Because this matter grew out of SfB's failure to accurately state Sievers' role in the applicant, it appeared that SfB's reporting of its ownership could not be relied on by the Commission. SfB argues that it was merely telling the Commission what its ownership would look like after the subscriptions were exercised. SfB fails to establish how it reached that view. But the record does not establish that it deliberately withheld the information. Its actions were the result of its being uninformed and careless. Nevertheless, it cannot be concluded that SfB should be disqualified for its carelessness.

ACCORDINGLY, IT IS ORDERED that the application of SfB Corporation (File No. BPH-860902MA) for a construction permit for a new FM station on Channel 295A at Moultonborough, New Hampshire IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 16

Transmittal Nos. 1555 and 1623

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1989; Released: May 26, 1989

By the Chief, Common Carrier Bureau:

1. On March 30, 1989, AT&T Communications (AT&T) filed Transmittal No. 1555 by which it proposes rates and terms and conditions for its Federal Telecommunications Service (FTS) 2000.[1] The pending tariff revisions include the same material AT&T previously filed under Transmittal No. 1493 except that rate information for FTS 2000 was not provided in the earlier transmittal. This Bureau required AT&T to remove the material filed under Transmittal No. 1493 on the grounds that it was "void for purposes of the notice provisions contained in Section 203(a) and Section 203(b)(1) of the [Communications] Act. . . ."[2]

2. On April 14, 1989, MCI Telecommunications Corporation (MCI) and Williams Telecommunications Group, Inc. (WTG) filed petitions to reject or suspend and investigate the captioned tariff revisions and Martin Marietta Corporation (Martin) filed a petition to reject. MCI and Martin argue that the proposed rates for FTS 2000 are unreasonably preferential and discriminatory. MCI Petition at 11-15; Martin Petition at 15-18. Moreover, petitioners contend that the proposed rates for FTS 2000 would be non-compensatory in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). MCI Petition at 5-11; Martin Petition at 6-15; WTG Petition at 5-11.[3] In addition, Martin and MCI argue that AT&T, in violation of Section 203(a) of the Act, 47 U.S.C. § 203(a), has failed to include in its tariff a contractual term that affects the proposed rates. Petitioners also contend that the contract provision in question requires a rebate of AT&T's tariffed charges in violation of Section 203(c) of the Act, 47 U.S.C. § 203(c). Martin Petition at 18-19; MCI Petition at 15-17.[4]

3. AT&T asserts in response that the extension of preferential rates to an agency of the Federal Government is specifically sanctioned by Section 201(b) of the Act. AT&T Reply at 7-10. Moreover, AT&T argues, even if this were not the case, FTS 2000 rates cannot be considered to be unreasonably discriminatory. AT&T contends that FTS 2000 is not like any other AT&T service, and, thus, any disparity between charges for FTS 2000 and for other services cannot constitute unreasonable discrimination. *Id.* at 11-14. AT&T also argues that any presumed discrimination in FTS 2000 rates is reasonable because of competitive considerations. *Id.* at 14-17.[5]

4. AT&T further contends that the support material provided with the captioned filing demonstrates that the proposed rates for FTS 2000 are compensatory and that the filing complies fully with the Commission's cost support requirements. *Id.* at 18-39. Finally, AT&T claims that petitioners' arguments that its filing violates Section 203 of the Act are premature and incorrect as a matter of law. Specifically, AT&T states that the proposed rates for FTS 2000 were developed with full knowledge of the price guarantee provision of the contract and that a rate decrease may therefore never be necessary. If a rate decrease is necessary, however, AT&T states that it would be filed prospectively. Further, according to AT&T, any credits required for calls previously billed would also be made by a tariff revision to be applied prospectively. *Id.* at 18-19.

5. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time. We note, however, that we are not persuaded by AT&T's argument that applying a prospective tariffed credit to amounts already billed would necessarily eliminate concerns regarding an unlawful rebate. Nevertheless, because this issue is not squarely presented by the pending tariff filing, and because the contingency on which the alleged rebate liability would depend may never arise, we conclude that no further action is necessary at this time.

6. Accordingly, IT IS ORDERED that the referenced petitions filed by MCI Telecommunications Corporation, Martin Marietta Corporation, and the Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Transmittal No. 1555 was originally scheduled to become effective May 14, 1989, on 45 days' notice. AT&T subsequently deferred the effective date of the proposed tariff revisions to May 28, 1989. *See* AT&T Tr. No. 1603, filed May 11, 1989. In addition, AT&T has proposed minor textual changes to the proposed tariff revisions under Transmittal No. 1623. AT&T requested special permission to make this filing on not less than five days' notice, to be effective May 28, 1989, concurrently with Transmittal No. 1555. AT&T's Application No. 538 was granted and we issued Special Permission No. 89-365.

[2] AT&T Communications, Tr. No. 1493, Order, 4 FCC Rcd 2426, 2428 (Com.Car.Bur. 1989).

[3] Petitioners argue specifically that AT&T has failed to consider the cross-elastic effects of FTS 2000 on its other tariffed services and that it has failed to include costs properly attributable to FTS 2000 in its cost projections. Petitioners also object that AT&T has arbitrarily inflated its projected demand for FTS 2000. At the same time, petitioners contend that the cost and demand data that AT&T has provided with Transmittal No. 1555 are inadequate to permit analysis of the proposed rates.

[4] According to petitioners, the contract that AT&T has entered into with the General Services Administration (GSA) for the provision of FTS 2000 service requires that the cost of a customer-dialed five minute call placed between 10:00 a.m. and 11:00 a.m. shall not exceed the lowest publicly available AT&T, MCI, or US Sprint rate for a call of the same duration and between the same points. If the Government determines that this requirement has been violated, the carrier will be required under the contract to lower its rates prospectively and to provide credit for calls already billed. Martin Petition at 18 n.26.

[5] As authority for this contention, AT&T states that "[w]ith regard to customized services in particular, the Commission has stated:

> [t]he competitive nature of the bidding process may force the dominant carrier to lower its rates below those specified in a current tariff in order to secure the business of the customer. So long as those rate reductions are not supported by improper cost-shifting or predatory in nature, they appear to be consistent with our general policies promoting efficiency through competition."

AT&T Reply at 15. AT&T cites as the source of this statement an action that it refers to as the *Decreased Regulation Order*, 2 FCC Rcd 645, 652 (1987). *Id.* at n.***. AT&T also asserts in its reply that the Commission there made a "finding that at least for custom-designed contract services, 'competition is sufficiently intense that dominant carriers . . . appear to have little or no market power.'" *Id.* at 4 (quoting 2 FCC Rcd at 646).

AT&T seriously misconstrues the Commission's action. As we have noted, AT&T refers to the Commission's action in CC Docket 86-421 as the *Decreased Regulation Order*. As AT&T is no doubt aware, that action was not a Report and Order adopting amended rules, nor was it a final statement of revised Commission policy. Rather, the document that AT&T cites as the *Decreased Regulation Order* was, in fact, a Notice of Proposed Rule Making that proposed tentative conclusions and solicited comment on the Commission's proposal to apply streamlined tariff regulation to certain segments of the domestic interstate telecommunications market. AT&T was among a number of parties who commented unfavorably on the Commission's proposal. No final action has been taken in that proceeding. All parties should be aware that such misconstruction of Commission precedent is not acceptable pleading practice.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-359

In the Matter of

Amendment of Section 73.202(b),	RM-5369
Table of Allotments,	RM-5587
FM Broadcast Stations	RM-5664
(Churubusco, Huntington, Roanoke	RM-5665
and South Whitley, Indiana)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1989; Released: June 23, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration and request for stay filed by Huntington Broadcasting Corporation ("HBC"), licensee of WIOE-FM, Channel 276A, Huntington, Indiana, of the *Report and Order*, 2 FCC Rcd 6505 (1987), which allotted Channel 242A to Churubusco, Indiana, substituted Channel 275A for Channel 276A at Huntington and modified HBC's license for Channel 276A accordingly, and allotted Channels 266A and 286A to South Whitley, Indiana, and Roanoke, Indiana, respectively. Erwin Draper ("Draper"), a proponent of a new FM channel allotment in Ligonier, Indiana, and Robert Peters ("Peters"), who intends to apply for Channel 242A at Churubusco, filed separate "Oppositions to Petition for Reconsideration and Request for Stay". HBC submitted a "Consolidated Reply to Oppositions to Petition for Reconsideration".[1]

BACKGROUND

2. On September 15, 1986, the Commission released a *Notice of Proposed Rule Making* [2] ("Churubusco *Notice* ") proposing the allotment of Channel 274A to Churubusco at the request of Consumers Aid, Inc. ("Consumers"). Prior to the release of the Churubusco *Notice*, but after the Commission received Consumers' request, HBC filed a petition to substitute Channel 275A for Channel 276A at Huntington and to modify its license accordingly in order to eliminate short-spacing to Channel 276A, South Bend, Indiana. The Commission treated HBC's petition as a mutually exclusive counterproposal to Consumers' request.[3] HBC submitted comments proposing the allotment of Channel 266A or 286A to Churubusco, and Consumers proposed allotting Channel 278A to Huntington.

3. On November 5, 1986, the Commission received petitions from Gary Salach ("Salach") seeking an allotment of Channel 266A to South Whitley, and Judith Selby ("Selby") seeking an allotment of Channel 286A to Roanoke. These petitions, mutually exclusive with the substitute channels proposed by HBC for Churubusco, were treated as counterproposals to the Churubusco *Notice*.[4] On the same day, Draper filed a petition requesting the allotment of Channel 242A to Ligonier, Indiana. Draper's petition did not mention the Churubusco proceeding. On January 7, 1987, HBC filed comments in response to the Salach and Selby counterproposals, suggesting allotments of Channel 242A to Roanoke, Channel 286A to Huntington, and Channel 274A to Churubusco. The staff then conducted a detailed analysis of all available equivalent channels in order to develop an allotment plan that would accommodate all of the explicitly stated proposals in this proceeding as well as the Ligonier proposal. In the course of this analysis, the staff considered the use of a number of possible channels at each community, including Channel 242A at Churubusco.

4. On October 9, 1987, we issued a *Notice of Proposed Rule Making* for the Ligonier proposal ("Ligonier *Notice* "). The Ligonier *Notice* proposed allotting Channel 274A, and not Channel 242A, to Ligonier due to a conflict between that community and communities in this proceeding.[5] The Ligonier *Notice* also imposed a site restriction for Channel 274A to avoid conflict with proposals in this proceeding. The Churubusco *Report and Order*, released October 22, 1987, allotted Channel 242A to Churubusco and stated, "Channel 242A had been requested in a separate proposal . . . for Ligonier, Indiana. However, alternate channel 274A has been proposed for that community."[6]

5. HBC's Petition for Reconsideration requests that the Commission modify the Churubusco *Report and Order*. HBC claims the Commission acted improperly by effectively treating the Ligonier proposal as a counterproposal to the Churubusco proceeding without notifying any of the parties that it was doing so. HBC, citing paragraph 3(b) of the Appendix to the Churubusco *Notice*, states that petitions for rule making in conflict with the proposals in the *Notice* and filed during the initial comment period will be considered as comments in the proceeding and a Public Notice of the petition will be issued, whereas a conflicting petition filed after the initial comment deadline will not be considered in connection with the proceeding. HBC claims the Ligonier proposal was filed after the date for initial comments in the Churubusco proceeding and should not have been considered in conjunction with the proceeding, but the Commission should have instead proposed to allot Channel 242A to Ligonier and refused an allotment to Roanoke. Since the Commission, in HBC's view, considered the effect of the Ligonier proposal on the Churubusco proceeding, HBC alleges the Commission should have issued a Public Notice of the Ligonier proposal, thereby treating the Ligonier proposal as a comment to the Churubusco proceeding.

6. HBC claims the Commission's failure to disclose the Ligonier proposal impermissibly denied HBC of its right to notice and comment in a rule making proceeding. HBC maintains it was unable to consider the effect of the Ligonier proposal in its January 7, 1987, channel proposal to allot Channel 242A to Roanoke, even though an allotment of the channel to both communities would violate the Commission's minimum mileage separation rules, as the existence of the Ligonier proposal was not made public until October 7, 1987. HBC claims a channel search for Channel 242A did not disclose the Ligonier proposal. HBC maintains a *Further Notice of Proposed Rule Making* should have been issued after HBC submitted its January 7 proposal, as the Commission was aware of the conflict between the proposed Ligonier and Roa-

noke allotments. HBC cites to *National Black Media Coalition*, 791 F.2d 1016 (2nd Cir. 1986), in support of its claim that the Commission cannot base a final decision on information available only to the Commission, as the public must be afforded a chance to comment. HBC also points to *FM Channel Assignments*, 62 RR 2d 535 (1987), in which the Commission states it will issue a new *Notice of Proposed Rule Making* when a new community, as opposed to a new channel, is to be considered in an allotment petition. HBC claims the Commission's failure to provide notice of the Ligonier proposal constitutes grounds for reconsideration.

7. HBC also claims that Channel 286A should have been allotted to the larger community of Huntington instead of Roanoke because Huntington is "the more important community under Section 307(b) precedent [and] is entitled to the channel it prefers, a channel capable of being upgraded to improve service to Huntington."[7] HBC claims that the Commission improperly allotted Channel 286A to Roanoke, a community with a population of less than 1,000, because that community is not large enough to warrant preferential treatment as compared to Huntington. HBC proposes, consistent with an allotment of Channel 274A to Ligonier, allotments of Channel 278A to Churubusco, Channel 266A to South Whitley, Channel 286A and/or 275A to Huntington, and Channel 242A to Roanoke, provided a showing of need is made for a Roanoke station. During the pendency of the reconsideration, HBC requests a stay of the *Report and Order*.

8. Draper filed an Opposition to HBC's Petition for Reconsideration. Draper notes that, until HBC's January 7 reply comments, HBC requested Channel 275A for Huntington, the channel it received. Draper maintains that HBC's January 7, 1987, channel plan constitutes an invalid counterproposal under the Commission's Rules as it was offered in reply comments and not during the initial comment filing period. Therefore, claims Draper, the Ligonier proposal did not conflict with the Churubusco proposal, as no party offered a valid counterproposal involving Channel 242A, and HBC never properly requested Channel 286A for Huntington. As a result, Draper maintains the Ligonier proposal at no time conflicted with a properly advanced proposal or counterproposal in the Churubusco proceeding, and the Commission did not have to bring the Ligonier proposal to HBC's attention.

9. In addition, Draper claims that HBC erred in contesting the allotment of Channel 286A to Roanoke, as the township in which Roanoke is located has a population of 3,610. Draper also maintains that HBC's claim that Huntington is entitled to a channel capable of being upgraded is speculative, as no party had mentioned the possibility of an upgrade until HBC filed its petition for reconsideration. Finally, Draper notes that the Commission examined various channel configurations, and not only the ones proposed, in order to come up with the best allotment plan. Therefore, Draper claims, a stay is not warranted, as HBC is unlikely to prevail on the merits of its petition.

10. Peters, in opposing comments, cites to language in the *Report and Order* and the Ligonier *Notice*[8] and claims that HBC is incorrect in asserting that the Commission improperly accounted for the Ligonier proposal, because the Ligonier proposal was actually treated as subject to the outcome in Churubusco. Peters also disputes HBC's arguments that Roanoke is not large enough to warrant preferential treatment as compared to Huntington. Peters claims that the cases cited by HBC involve comparative proceedings in which there were insufficient channels to accommodate all of the proposals under consideration, whereas in the instant case each community can be provided with a channel of the class requested. Peters describes HBC's submission of another allotment plan as "grossly late" and one which offers no advantages over the plan adopted in the *Report and Order*. As a result, Peters opposes a stay.

11. HBC submitted a consolidated reply. HBC claims Peters' assumptions concerning the preference given to Roanoke are wrong, describing Peters' view as, "if a channel is available, allot it." Instead, HBC argues, the Commission must determine that a community exists and that a more deserving community will not be precluded from an allotment. HBC claims that Draper is incorrect in discussing the population of the township in which Roanoke is located, as the Commission does not examine the size of townships in making allotments.

DISCUSSION

12. After full consideration of the pleadings in this case, we deny HBC's petition for reconsideration and request for a stay. Accordingly, we affirm the allotment plan set forth in the *Report and Order*.

13. HBC's challenge to the allotment of a channel to Roanoke is grossly late. No party, including HBC, previously challenged the community status of Roanoke, an incorporated town.[9] Indeed, throughout the proceeding HBC advanced channel proposals that included an allotment to Roanoke. In addition, as each community in the proceeding could receive a channel of the class requested, a comparative examination of community needs was unnecessary.

14. It is incumbent upon a petitioner to raise potential upgrade concerns before the close of the initial comment date. HBC was untimely in discussing the possibility of a future upgrade for the first time in its petition for reconsideration. HBC offers no explanation as to why it did not discuss its desire for a potentially upgradable station at an earlier stage in the proceedings, or why the Commission should now take this into account.[10] A petition for reconsideration must rely on facts previously presented unless the Commission determines that consideration of the new facts presented is required in the public interest.[11] We do not find it in the public interest to consider at this late date the possibility that HBC may wish to upgrade its facility at a future time. Consideration of HBC's argument would effectively constitute an unjustified waiver of the Commission's Rules, in that it would amount to consideration of an untimely counterproposal.

15. Furthermore, the Commission acted properly in developing the allotment plan approved in the Churubusco *Report and Order*. Paragraph 3(c) of the Appendix places petitioners on notice that a counterproposal may lead to the allotment of channels equivalent to those originally requested. The Commission can also allot a different channel of the same class on its own motion in a rule making proceeding in order to ensure the most efficient use of the spectrum.[12] In the instant proceeding, each party received a Class A station, as requested, even if not the particular channel sought.

16. That the Ligonier proposal was not expressly brought to the attention of the parties in this proceeding until the *Report and Order* was issued did not violate proper notice and comment procedure. Paragraph 3(b) of the Appendix to all allotment *Notices* states that petitions for rule making filed during the period for submitting initial comments that are in conflict with the proposals in the *Notice* will be treated as comments. The Ligonier proposal for Channel 242A conflicted with no proposals or counterproposals in the Churubusco proceeding when it was submitted, as no party to the Churubusco proceeding had proposed the allotment of Channel 242A or any other potentially conflicting channel to any of the four communities.[13] While HBC's January 7, 1987, channel proposal conflicted with the Ligonier proposal in that each proposed a conflicting allotment of Channel 242A, the Commission was still able to assign a Class A station to each community. The Ligonier proposal was treated in a separate proceeding as dictated by Commission Rules. Furthermore, the Commission treated the Ligonier proposal as secondary to the Churubusco proceeding. The Commission allotted Channel 242A to Churubusco in order to resolve conflicts among the four parties, even though the Commission had to find an alternate channel for Ligonier.[14] Furthermore, throughout this proceeding, HBC requested the allotment of Channel 275A in order to eliminate short spacing to another station.[15] HBC noted its willingness to accept Channel 275A as a second choice even in its Petition for Reconsideration.[16] The *Report and Order* allotted Channel 275A to Huntington. Therefore, HBC received precisely what it originally requested--a Class A station that would permit HBC to alleviate a short-spacing problem.

17. Accordingly, IT IS ORDERED, That the petition for reconsideration and request for stay filed by Huntington Broadcasting Corporation IS DENIED.

18. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] HBC also filed a copy of its Petition for Reconsideration in response to the Ligonier, Indiana, *Notice of Proposed Rule Making*, 2 FCC Rcd 6096 (1987), and a Statement for the Record noting that it would await action on its Petition for Reconsideration before submitting a minor change application for a construction permit as ordered in the *Report and Order*.

[2] 51 FR 33645, September 22, 1986. Comments were due by November 6, 1986, and reply comments by November 21, 1986.

[3] HBC's proposal was announced at Public Notice 1622, October 8, 1986.

[4] Public Notice 1634, December 23, 1986. Comments were due by January 7, 1987.

[5] *See* 2 FCC Rcd 6096 (1987) at note 1.

[6] *Report and Order* at note 5.

[7] HBC, "Petition for Reconsideration" at 10-11.

[8] *Report and Order* at note 5, Ligonier *Notice* at paragraph 2.

[9] Incorporation is generally sufficient to establish community status. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

[10] A channel search by the Commission has determined that a substitution of Channel 286A for Channel 286C2 at Huntington would conflict with pending allotment proposals for Angola and Decatur, Indiana. *See Notice of Proposed Rule Making* (MM Docket 88-284), 3 FCC Rcd 4031 (1988). HBC failed to file a counterproposal in the Angola proceeding as a means of protecting its interests.

[11] Commission Rule §1.429(b)(3), 47 CFR 1.429(b)(3).

[12] *See Williston and Micanopy, Florida*, 50 RR 2d 1425 (1982).

[13] Despite HBC's claim to the contrary, the Ligonier petition was filed before the deadline for filing initial comments in the Churubusco proceeding. Ligonier petition was filed November 5, 1986, and Churubusco comments were due by November 6, 1986.

[14] *See Ligonier Notice* at note 1, *Report and Order* at note 5.

[15] HBC requested Channel 275A in its pleadings of September 10, 1986, October 16, 1986, and November 13, 1986.

[16] HBC stated it would accept Channel 275A as a second choice in its pleadings of January 7, 1987, and February 25, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure — CC DOCKET NO. 78-72

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — CC DOCKET NO. 80-286

REPORT AND ORDER

Adopted: December 9, 1988; Released: December 12, 1988

By the Commission:

I. INTRODUCTION

1. On July 12, 1988, we released an order inviting comments as part of a reconsideration decision in our access charge proceeding to consider whether we should continue a bifurcated carrier common line (CCL) charge structure after April 1, 1989, or return to equalized charges on that date. Based on our review of the record, we conclude that a balanced approach that protects against originating rates reaching too high a level for any individual company, yet minimizes the differentials between originating and terminating CCL charges, would be best for the new pooling environment. We accordingly require local exchange carriers (LECs) to set their originating CCL rates at one cent, and to set their terminating rates to recover the remaining interstate revenue requirement.

II. BACKGROUND

2. Our access charge rules originally provided that CCL costs would be recovered through a uniform charge assessed on both originating and terminating switched access minutes.[1] In early 1986, however, we adopted temporary measures to reduce some of the incentives for uneconomic bypass inherent in the existing cost recovery system pending implementation of a more permanent solution.[2] The *WATS Order* froze the terminating CCL charge at its then-existing level of 4.33 cents per minute of use, and provided that any subsequent common line cost reductions during an interim period expiring December 31, 1987, would be applied to reduce the originating charge. In this way, we sought to minimize incentives for uneconomic bypass on the originating end. We found that bypass is more technologically feasible at the originating end.

3. Our May 1987 *NTS Recovery Order*, which adopted comprehensive recommendations proposed by the Joint Board in CC Docket Nos. 78-72 and 80-286 (Joint Board), extended the expiration date of the interim rule for bifurcated originating and terminating CCL charges until November 30, 1988, to coincide with the effective date of the second $.60 subscriber line charge increase.[3] Pursuant to the terms of that order, on May 1, 1987, the National Exchange Carrier Association (NECA) filed tariff revisions that used the revenues from the initial $.60 subscriber line charge increase to reduce the originating CCL charge. As a result, the nationwide originating CCL charge was lowered to .69 cents per minute, while the terminating end CCL charge remained at 4.33 cents per minute. The originating charge was further reduced when the 1988 access tariffs became effective on January 1, 1988, and now stands at zero. These access tariff filings also slightly reduced the nationwide terminating CCL charge to 4.14 cents per minute.[4]

4. Our July 1988 *NTS Recovery Reconsideration Order* generally affirmed the fundamental decisions in the *NTS Recovery Order*.[5] In particular, we expressly affirmed our initial decision to use the revenues from the July 1987 $.60 subscriber line charge increase to reduce the originating CCL charge. We accordingly declined to adopt MCI's suggestion that we require LECs to apply the decrease in the CCL charges resulting from the July 1987 subscriber line charge increase equally to originating and terminating minutes.[6] We observed that, at least for the near term, technological factors and economic incentives indicate that originating end bypass remains more feasible than terminating end bypass. We accordingly decided to retain our approach of applying the initial reduction in the CCL charge exclusively to the originating charge in order to deter bypass and foster increased originating switched minutes of use.

5. The *NTS Recovery Reconsideration Order* acknowledged that we had originally adopted bifurcated CCL charges as a temporary measure pending establishment of a more permanent cost recovery program. We nevertheless determined that we should extend bifurcated charges until March 31, 1989, to avoid unnecessary rate churn, to further minimize the incentives for originating end bypass prior to implementation of the final incremental subscriber line charge increase on April 1, 1989, and to afford us time to invite and analyze comment on whether the bifurcated approach to CCL charges should be continued in the new pooling environment.

6. Our order noted that the implementation of the cost recovery changes on April 1, 1989, offered an appropriate time to consider whether bifurcated CCL charges should be retained for an additional period after that date, or whether equalized charges should be reinstituted. We accordingly invited comments on that question. Numerous parties filed comments and replies. As was noted above, our review of the record on this issue leads us to conclude that setting originating CCL rates at one cent, with any interstate revenue requirement in excess of that amount to be added to that carrier's terminating rate, will produce the best results in the new pooling environment. Any LEC that would have a terminating rate of less than one cent will be required to equalize originating and terminating rates. We believe that this rule offers the best balance of the many important factors raised by the commenting parties.[7]

III. POSITIONS OF PARTIES

7. Twenty five parties filed comments in response to our order inviting comments, and fifteen parties filed replies. Most of the commenting parties are LECs or LEC associations, but comments were also submitted by four interexchange carriers (IXCs), NECA, two user groups and an organization of enhanced service providers.[8]

A. *Positions of Parties On A Flexible CCL Rate Approach*

8. A number commenting parties, primarily LECs, urge us to adopt a flexible policy that would allow non-pooling LECs and the NECA common line pool to set their own originating and terminating CCL rates individually after April 1, 1989. These parties propose that each LEC be permitted to set its originating rate at a level ranging from zero up to the terminating rate set by that carrier.[9] They observe that some LECs would perceive bypass to be a significant concern in their area and would like to have a low originating charge, whereas others would consider that the administrative ease of equalized charges is preferable. To accommodate such different circumstances, these commenters urge that LECs should have the flexibility to set their CCL rates to adjust to local market conditions.

9. Many LECs that advocate flexibility intend to leave the common line pool. Some intend after that time to utilize equalized charges; others prefer bifurcated rates. Their common ground is to favor a policy that affords LECs the option to set individual rates instead of having a nationwide rate set by this Commission. BellSouth, for example, argues that this flexibility is consistent with the Communications Act. It also asserts that, in addition to accommodating differences among carriers, the flexibility option would recognize that circumstances change over time and would allow LECs to take customer specific uses of the local network into account in establishing their rates.[10] USTA notes that this approach would be consistent with the traditional relationship between a common carrier, which initiates a tariff for new or modified services, and a regulatory body, which exercises oversight, but does not generally set rates.[11] GTE emphasizes that, since LECs leaving the pool will take greater responsibility for recovery of their own non-traffic-sensitive (NTS) costs, those LECs should have the ability to respond to conditions in their own market.[12]

10. A number of parties oppose the LECs' requests for flexibility in setting their CCL rates. These parties note that such proposals are beyond the scope of this proceeding, in that our order inviting comments expressly disclaimed any intention to examine "any broader questions relating to CCL rate flexibility," and contend that a further notice would be required to adopt such an approach.[13] Ad Hoc cites our 1986 order rejecting several LEC requests for waivers relating to NTS recovery, which, it suggests, required any LEC seeking flexibility in NTS recovery to file a petition for waiver and accompanying tariff proposal.[14] Ad Hoc claims that the LECs have ignored these prior Commission findings that general flexibility in NTS cost recovery is not appropriate, and that any specific requests for flexibility must be individually justified. ADAPSO asserts that this Commission cannot abdicate its responsibility to determine whether a particular access charge structure is consistent with the public interest to the carriers by allowing them the flexibility the seek.[15]

11. ADAPSO and Teleconnect also express concern that, if LECs are accorded the flexibility the LECs request, there could be a substantial variation in the charges between jurisdictions.[16] According to ADAPSO, this lack of uniformity could adversely affect the operations of regional carriers and provide IXCs with an added incentive to deaverage rates, and perhaps to charge higher rates for their customers to make sure the IXCs cover their costs – all to the detriment of users. Teleconnect adds that a flexible pricing scheme would require IXCs to accommodate these pricing differences by changing their rates, reconfiguring their operations, or even discontinuing service to an area altogether. Ad Hoc, ADAPSO and ARINC further note that a decision to accord LECs the flexibility the LECs request is completely unjustified by the current extent of bypass, and would produce unnecessary and undesirable rate churn.[17] Teleconnect agrees that multiple changes in LEC CCL charges will produce rate churn, resulting in "virtual chaos for both IXCs and their subscribers."[18]

B. *Positions of Parties Favoring Equalized CCL Rates*

12. The record reflects support from a variety of parties for equalized CCL rates beginning April 1, 1989.[19] In addition, a number of LECs and NECA voice support for the advantages of equalized rates, but believe we should accord LECs the flexibility to set either bifurcated or equalized rates as necessary to meet local market conditions.[20] Ameritech and Pacific further suggest that it may be appropriate to provide for a transition from bifurcated to equal rates to avoid significant rate changes or customer disruption.[21]

13. Many parties consider that equalized CCL rates would alleviate some of the troublesome administrative problems that accompany a bifurcated rate structure. Several commenters, including LECs, IXCs and NECA, claim that bifurcation has created significant administrative difficulties for the billing of access charges for those 800, 900, 700 and foreign exchange (FX) services that involve two open ends.[22] According to Lincoln, these problems hamper a LEC's ability to achieve its authorized rate of return and create demand forecasting difficulties in rate development.[23] NECA observes that the procedures requiring LECs to rely on their customers for needed billing information are burdensome and administratively complex. It adds that these billing problems can only be expected to increase as message volumes in these services grow and IXCs develop similar service offerings.[24] ADAPSO and ARINC emphasize that these disputes have not been fully resolved as some allege.[25]

14. NTCA identifies another administrative difficulty as the principal problem with the bifurcation plan. Non-equal access end offices do not have the technical capability to measure terminating minutes of use (MOUs) directly. Such terminating minutes must be derived by applying a factor to originating minutes.[26] Several commenting parties express concern that this process reduces the accuracy of carrier access billing. NECA observes that it is particularly important to obtain accurate terminating MOU data when the originating rate is at zero, since all CCL cost recovery then depends on terminating MOU billing. NECA and OPASTCO emphasize that LEC billing is more accurate when there is a charge on the originating end because the originating charges are based on actual billed minutes, and a smaller portion of the overall CCL charge is obtained through derived terminating

MOU data. Those commenters indicate that the reinstitution of a charge on the originating end would improve billing accuracy and reduce administrative burdens on both LECs and IXCs.[27]

15. Several commenters maintain that the administrative difficulties associated with the current bifurcated rate structure are burdensome and confusing for the LECs and their customers.[28] ADAPSO also contends that a bifurcated system would always be more expensive and less efficient to administer than a system based on equalized charges. It urges us to reinstitute equalized access charges because such a system is easy to understand, simple and less expensive to apply.[29]

16. Microtel, a regional IXC, observes that bifurcation could not only distort traffic among regions in a "depooled" environment, it could also distort traffic among carriers, depending on which carriers provide originating service from which regions. It urges us not to structure access charges in ways that interfere with the normal workings of interexchange competition -- as it considers bifurcated rates would do -- and concludes that equalized charges should be reinstituted no later than April 1, 1989.[30]

17. Ad Hoc and ARINC assert that equalization of CCL rates will ensure rate predictability and reduce rate churn.[31] Ad Hoc observes that equalization will not require large IXCs to incur unnecessary costs for new facilities or marketing efforts or cause IXCs to raise their rates as MCI and US Sprint claim,[32] since these carriers generally set their rates in relation to AT&T's rates, rather than in response to slight differences in their access costs. According to Ad Hoc, in recent years AT&T has not priced its services to match differences in access costs on a dollar-for-dollar basis, and thus rate changes for AT&T, and in turn for MCI and US Sprint, would not necessarily follow from the reestablishment of equal rates. Ad Hoc also notes that equalization would not require IXCs to change their pricing practices because the overall CCL has declined so much in the last several years that originating switched access will remain highly economical and efficient even if rates are equalized on April 1, 1989.[33]

18. Ameritech states that most large volume users of switched access choose services that are not subject to the originating CCL (such as WATS or MEGACOM) and accordingly are indifferent to the level of the originating CCL. Such customers are, however, very sensitive to the overall cost of their service, which includes the terminating charge. Under a bifurcated rate structure, these customers pay more for their use of the public switched service than such customers would if the CCL charges were equalized. Thus, Ameritech concludes, these customers will pay more overall for their services under a bifurcated scheme, and their usage of switched services would be suppressed in favor of special access and private networks.[34]

19. User and enhanced service provider groups contend that bifurcation creates a discriminatory pricing scheme since it results in services with one open end paying twice as much in NTS costs per minute as services with two open ends. Ad Hoc and ADAPSO note that services with two open ends now pay 2.07 cents per minute per end to cover the NTS costs incurred for exchange access, whereas services using only one open end pay 4.14 cents per minute on their one open end. Those commenters argue that this differential is unjustified because there is no difference in the plant utilized or in the costs incurred at either end of a call. Ad Hoc, ADAPSO and ARINC claim that the current bifurcated charges discriminate against users of special access services such as FX, WATS and 800 Services, in violation of the requirements of the Communications Act.[35] ADAPSO adds that, if equalized charges produce a more rational and equitable pricing system that causes users to migrate to more economically attractive services, the public interest is served.[36]

20. Some parties that prefer a return to equalized charges acknowledge that bifurcated charges may have reduced the incentives for bypass to date. Those parties believe, however, that the implementation of the final subscriber line charge increases -- and the accompanying CCL rate reductions -- will lower bypass incentives to such a point that it will no longer be necessary to load all or most NTS costs on the terminating end to deter uneconomic originating end bypass.[37] Ad Hoc, ADAPSO and ARINC contend that the existence of a contemporary bypass threat has not been proven to an extent that would justify continuation of the bifurcated CCL charge.[38] A number of parties also suggest that maintenance of a large differential between originating and terminating rates could lead to the growth of uneconomic bypass on the terminating end.[39]

C. *Positions of Parties Favoring Bifurcated CCL Rates*

21. Parties who prefer that some form of bifurcated rate structure continue past March 31, 1989, advocate a variety of possible rules. MCI and US Sprint favor retention of a bifurcated rate structure with the originating rate set at zero, and all the cost recovery shifted to the terminating CCL charge.[40] Several LECs say that, even if the CCL rates are bifurcated, the originating rate should be set at a specified level above zero.[41] Contel, for example, urges us not to mandate an originating rate of zero because this could have severe consequences for depooled LECs serving high-cost areas.[42] Many LECs that favor bifurcated rates also urge this Commission to adopt a flexible policy that would allow non-pooling LECs and NECA (which will continue to administer the voluntary common line pool) to set their own originating and terminating CCL rates individually after April 1, 1989, at a level ranging from zero up to the terminating rate.[43] US Sprint and several LECs suggest that we extend some form of a bifurcated structure for an additional period of time after April 1, 1989, and reexamine the question after the specified period is completed. The time periods proposed range from two years to the end of the four-year pooling transitional support period.[44]

22. Some parties that favor bifurcated rates acknowledge the implementation problems with certain 800 services described in our *NTS Recovery Reconsideration Order*, and note that the same billing difficulties exist with the 800 calling card numbers utilized by some IXCs, as well as with 700 and 900 services. These parties claim, however, that the various arrangements being developed to address these billing problems are acceptable, and conclude that any problems these billing mechanisms may cause are outweighed by the benefits associated with bifurcated rates.[45]

23. A few LECs challenge the contention that bifurcated rates are more complex to administer than equalized rates. GTE notes that the same estimates of originating and terminating traffic are used to develop rates in either case.[46] Moreover, Bell Atlantic observes that the problems with measuring terminating minutes are diminishing in

that some LECs have substantially converted their offices to provide equal access, and can accordingly actually measure terminating minutes in those offices.[47]

24. Several parties contend that equalizing the CCL rates would not decrease any pressure on IXCs to deaverage their rates. AT&T, for example, observes that, to the extent disparities in access costs and charges among regions as a result of depooling might provide IXCs with some incentive to deaverage their rates, that incentive would exist whether the CCL rates are equalized or bifurcated.[48] GTE suggests that, if LECs use flexibility to mitigate extremes in their depooled rates, this could actually alleviate the concern over rate disparities raised by AT&T.[49] A number of LECs note that there is already substantial variety among the traffic sensitive (TS) costs and charges for different regions, and that these differences have not resulted in deaveraged rates.[50] UTS claims that, once the final subscriber line charge increase becomes effective in April 1989, the CCL charge will only recover approximately 25 percent of interstate costs, with the rest being recovered through the TS and subscriber line charges. Under these circumstances, asserts UTS, any changes in the CCL rate structure are unlikely to increase significantly the pressure to deaverage rates, when weighed against the added administrative costs that any such deaveraging would cause for IXCs.[51] Finally, several parties observe that there is no reason why IXCs could not continue to average their rates if LECs set different CCL rates, and emphasize that this Commission retains the authority to review the IXCs' rate structures and could require interstate toll averaging if necessary.[52]

25. Our *NTS Recovery Reconsideration Order* expressed concern that bifurcated rates increase the potential for traffic distortions among regions. GTE responds that there will be no effect on point-to-point traffic flows so long as we maintain our geographic averaging policy. GTE further contends that, if LECs had the flexibility to set their own CCL rates, the LECs would have the incentive to choose that combination that would minimize adverse effects on traffic flows.[53] PRTC responds to Microtel's concern that bifurcation would distort traffic among regions and among regional IXCs by commenting that such "distortion" reflects the fact that both bifurcated and equalized rates will benefit some carriers and disadvantage others; the "winners and losers" would simply be different depending on which rule is adopted.[54]

26. MCI and US Sprint focus on the effect that equalized rates would have on the relative prices of switched versus dedicated access services. These IXCs note that they have invested heavily in developing and marketing products and services that utilize switched access services in recent years. They suggest that equalization of the CCL rates -- which would create a new differential between the CCL rates of services with two open ends and those with only one open end -- could cause IXCs to increase their rates for switched services. If the rates for dedicated services become more attractive relative to switched service rates, these IXCs express concern that customers may find that customers should change their service/product mix to take advantage of the new pricing environment, which would be costly and inconvenient for IXCs and their customers.[55] Bell Atlantic further explains that any increase in the originating CCL rate will reduce the crossover point at which users will find special access services and private networks less expensive than switched access, and would increase incentives for users to turn to alternatives to switched access.[56]

27. Parties advocating a continuation of bifurcated rates stress that bifurcation would continue to reduce the incentives for uneconomic bypass on the originating end, where bypass remains more feasible.[57] These parties note that the incentives for bypass on the terminating end will be lower in the future when the terminating rate is reduced with the final subscriber line charge increases. While such parties acknowledge that terminating bypass is still a valid concern, they nevertheless believe that it is appropriate to maintain a lower originating charge because terminating end bypass will continue to be less feasible due to the technical difficulties of aggregating traffic on that end, and the fact that it is considerably easier to offer pricing incentives on the originating end.[58] SWB also observes that the price elasticity of terminating minutes is likely to be smaller than for originating minutes, and argues that a rate increase for the more price elastic originating usage would increase economic distortion and would be less economically efficient. It further suggests that there is no noticeable evidence that would suggest that the focus of bypass has shifted to the terminating end as a result of bifurcation.[59] Bell Atlantic and US West observe that, even if the risk of terminating bypass were reduced by lowering the terminating CCL rate, it would do so only by contributing to the growth of originating end bypass.[60]

28. Another advantage of bifurcation with a zero originating rate, according to UTS, is that it could encourage IXCs to offer originating long-distance service in high-cost areas.[61] GTE suggests that a low originating rate could encourage the introduction of new "loop products."[62]

IV. DISCUSSION

29. Our *NTS Recovery Reconsideration Order* requested comment on whether we should retain bifurcated rates for some period of time after March 31, 1989, or equalize the CCL charges on that date. The comments confirm our initial observation that both ratemaking methods offer certain advantages and disadvantages, and demonstrate that there is no clear consensus supporting either of these alternatives. While a number of parties argue that the best course would be to permit LECs certain flexibility in setting their CCL rates, we conclude that it would not be appropriate to accord LECs such flexibility at this time. Instead, we have decided to adopt a balanced approach that captures many of the benefits of both bifurcation and equalization, while at the same time minimizing the disadvantages of each method.[63] Thus, effective April 1, 1989, we will require LECs and the NECA common line pool to set their originating CCL rates at one cent ($.01), and to set their terminating rates to recover the remaining interstate CCL revenue requirement. If the remaining revenue requirement would produce a terminating charge of less than one cent, we require the LEC to equalize CCL charges.[64]

30. When we requested comment on the alternatives of bifurcated or equalized rates, we said that we did not intend to examine questions regarding CCL rate flexibility. However, a number of parties (chiefly LECs and LEC associations) nevertheless propose that each LEC (and NECA) be accorded flexibility to set its originating CCL rate at a level ranging from zero up to the terminating

rate of that LEC. These parties contend that LECs should have the flexibility to set their CCL rates to adjust to local market conditions.[65]

31. We do not seek to resolve these issues here, because from a procedural standpoint, we reiterate that our order inviting comments explicitly disclaimed an examination of "any broader questions relating to CCL rate flexibility."[66] In this circumstance, we agree with those parties who assert that it would be inappropriate to address questions relating to the broad CCL rate flexibility proposed by the LECs in this narrow proceeding. We are also concerned that such CCL flexibility could create certain administrative complications for carriers, users, and for this Commission's tariff review process during the initial period of the new pooling structure, when many administrative changes relating to the pooling arrangements and access charge system will be instituted. We accordingly decline to allow individual LECs the flexibility they request to set their originating rates at any level between zero and a level equal to their terminating rate.

32. As we recognized in our *NTS Recovery Reconsideration Order*, both equalized CCL charges and bifurcated charges with a zero originating rate could produce some benefits, yet both of these methods have certain drawbacks that lead us to conclude that neither method should be adopted in the form proposed by most of their advocates.

33. Many parties urge us to retain bifurcation because a lower originating rate discourages uneconomic bypass, which remains more feasible on the originating end. These parties also emphasize that high originating charges result in LECs encountering difficulties in attracting IXCs to provide and market originating interexchange service in their areas. We agree with these commenters that originating end bypass still appears more likely than terminating end bypass for both the technical and economic reasons detailed at length in the record.[67] Moreover, we agree that a lower originating rate should help higher-cost LECs to encourage IXCs to provide and market originating interexchange service in those LECs' serving areas.

34. We do not, however, believe that an extreme form of bifurcation, *e.g.*, with an originating rate at or near zero, is necessary or appropriate to address these concerns. We consider the one cent originating rate we establish to be the best threshold level to implement this policy because it should enable higher cost companies to deter bypass and encourage IXCs to provide originating interexchange service in all areas, but will avoid the problems that result when the terminating rate is disproportionately high as compared to the originating rate.[68]

35. We have also considered the effect that our decision might have on the pricing of interexchange services. Several parties advocating a continuation of bifurcation suggest that equalized rates could lead to pressure to increase the price of interexchange services that use switched access on both ends of a call relative to those that use switched access on one end of a call and special access on the other end.[69] This could put upward pressure on rates for MTS, a result we would not favor. Moreover, US Sprint and MCI claim that this could lead customers to change their service/product mix to take advantage of any new pricing policies. Those carriers assert that this would be inconvenient for customers, and costly for those IXCs that have focused their development and marketing strategies on switched access services in recent years.

36. We believe that our rule, which produces a moderate originating charge with a greater recovery through terminating charges, will not result in a substantial increase in the price of switched access services or result in a significant shift of customers away from switched services.[70] Moreover, our one cent cap on the originating charge provides LECs with a means of protecting against high originating rates and will accordingly minimize incentives for bypass on the originating end. This should moderate any tendencies of users to migrate away from the switched network.

37. Our decision will help to address another important concern we identified in our order, the effect of our CCL rate structure on traffic flows between regions and on pressures to deaverage interstate toll rates. The record does not clearly indicate whether bifurcation schemes as a rule encourage distortions in these areas. Microtel suggests that continuation of the current bifurcated rate scheme, with its large differentials in the CCL charges on the two ends, would not only distort traffic among regions in a depooled environment, it would distort traffic among IXCs that serve those different regions as well. By contrast, in an *ex parte* presentation, AT&T suggests that, as compared to an equalized rate scheme, bifurcated rates could slightly decrease the incentive to deaverage rates in a depooled environment.[71] AT&T, however, joins other parties who suggest that pressures to deaverage interstate toll rates in a depooled environment will be the result of variations in access charges among depooled LECs, and that the decision of whether to have bifurcated or equalized CCL charges would probably have a relatively small effect on deaveraging pressures.

38. We remain concerned about these possible effects, although we agree with those parties who argue that other factors could have a greater effect on traffic distortion and rate averaging than our decision on CCL rate structure. We nevertheless believe that by minimizing differentials in the CCL charges among regions, our rule may also help to reduce any distortions. In addition, we emphasize that this Commission retains the authority to address problems regarding geographic averaging, and we remain strongly committed to our long-standing policy of geographically averaged interstate toll rates.

39. We recognize that a policy of requiring LECs to "cap" their originating charge at one cent will introduce some of the difficulties inherent in any bifurcated rate scheme for the affected LECs. We conclude, however, that the disadvantages associated with having a higher, equalized originating rate, particularly in terms of combatting bypass and attracting IXCs to a high-cost LEC's serving area, outweigh the problems associated with the measured form of bifurcation that we adopt in this order. We also believe, as discussed below, that most of the concerns raised in the record relating to the potential adverse effects of bifurcated rates will be mitigated by the one cent cap, or are abating due to other external factors.

40. For example, several of the problems associated with bifurcated rates that are addressed by commenting parties derive primarily from the substantial differential that currently exists between the originating and terminating CCL charges. First, a variety of parties observe that the prospect of terminating bypass is by no means purely hypothetical, and express concern that continuation of a large differential between the originating and terminating rates would lead to the development of viable terminating bypass alternatives. Thus, to the extent that our action in

this order results in terminating rates that are lower than those rates would be under the present bifurcated scheme, this should minimize the incentives to develop terminating end bypass alternatives.

41. Second, we also note that our decision will substantially resolve the concern expressed by user and enhanced service provider groups that bifurcation results in services with one open end paying significantly more in NTS costs per minute than services with two open ends. As several parties observe, the continuation of a great disparity in CCL charges would encourage IXCs to offer, and users to select, service offerings that take advantage of this differential. Our decision to require LECs to set their originating charges at one cent (or equalize their charges if their rates would be lower than one cent) will significantly reduce the differential that currently exists between the originating and terminating charges. We further believe that our approach will help to moderate rate churn and ensure greater rate predictability, which would benefit both IXCs and users who need to make long-range projections for their telecommunications use and marketing strategies.

42. In our order, we identified several factors that we believed militated in favor of equalized rates. Many of these factors relate to administrative difficulties that have arisen under the bifurcated rate system. We noted, for example, that bifurcated charges have created implementation problems for certain new services, such as 800 services that use common line access on each end (*i.e.*, have two open ends). IXCs providing such services are improperly assessed the higher terminating charge by the LEC providing originating end access because that LEC is not able to distinguish these services from 800 services with one open end, which are properly assessed the higher charge.[72] Under our current bifurcated rate structure, it has been necessary for LECs to refund or credit the difference between the zero originating rate and the higher terminating charge to IXCs providing these services.

43. Although the record indicates that these refund or credit arrangements have caused some administrative difficulties, many of the commenting parties -- including both LECs and IXCs -- are of the view that the mechanisms now in use are adequately addressing these problems.[73] We acknowledge that those 700, 800, and 900 services that terminate on a common line are more difficult to bill properly with bifurcated charges. It appears, however, that the credit mechanisms that have been developed to address this situation are working acceptably from the perspective of most of the carriers involved in these arrangements, including both LECs and IXCs. It further appears that many of the difficulties that have plagued these arrangements to date stem from the fact that both the services themselves and the access charge credit schemes that have been developed to remedy the problem are new. We expect that most of these problems will be resolved as the credit mechanisms are improved and as the carriers involved become accustomed to the new service arrangements.

44. Several parties note that minute counts for terminating MOUs on the whole tend to be less reliable than for originating minutes because in non-equal access offices terminating minutes can not be measured, but must be estimated based on originating minutes.[74] According to these parties, this problem leads to inaccuracies in access charge billing, particularly when all of the billings are associated with terminating MOUs as they are with the current zero originating rate.[75] Although we consider this to be a valid concern, we agree with Bell Atlantic that the problems associated with measuring terminating MOUs are diminishing rapidly as LECs progress on converting their offices to equal access, since converted offices generally are capable of measuring terminating MOUs. We note that 87 percent of LEC telephone lines are expected to be converted to equal access by the end of 1988.[76] Moreover, since our approach will result in a greater proportion of billings being associated with originating MOUs than under the current bifurcated charges, the impact of any inaccuracies in terminating MOU counts will be much reduced.

45. Finally, we note that having a one cent charge on the originating end -- as compared to a zero originating rate -- should assist the tariff review process. The econometric forecasting models used by this Commission to evaluate the tariff filings of the LECs and NECA require accurate estimates of demand. Implementing an originating rate above zero will assure more accurate counts of originating minutes due to the billings associated with those minutes. Thus, the one cent originating cap we impose will facilitate review of access charge tariffs.

46. In summary, for the reasons detailed above, we conclude that as a general rule in the new pooling environment we should require non-pooling LECs and the NECA common line pool to set their originating rates at one cent effective April 1, 1989, with the remaining carrier common line revenue requirement allocated to the terminating charge. If this method would result in a terminating rate for an individual carrier of under one cent, that carrier must utilize equalized rates.

47. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements that are applicable to the public, and will not increase or decrease burden hours on the public.

48. We certify that the requirements contained in the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, are not applicable to the rules that may result from this proceeding.[77]

V. ORDERING CLAUSES

49. IT IS HEREBY ORDERED, that, pursuant to 47 U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 403, 405, and 410 and 5 U.S.C. § 553, that the CCL rate structure described in the foregoing paragraphs shall be implemented in the common line tariffs that will become effective on April 1, 1989.

50. IT IS FURTHER ORDERED, that the rule modifications contained in Appendix B are ADOPTED, effective April 1, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

Ad Hoc Telecommunications Users Committee (Ad Hoc)

American Telephone & Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

Cincinnati Bell Telephone Company (CBT)

GTE Telephone Operating Companies (GTE)

Lincoln Telephone and Telegraph Company (Lincoln)

MCI Telecommunications Corporation (MCI)

Microtel, Inc. (Microtel)

Missouri Telephone Communications Association (MTCA)

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (U S West)

National Exchange Carrier Association (NECA)

National Telephone Cooperative Association (NTCA)

New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Puerto Rico Telephone Company (PRTC)

Rochester Telephone Corporation (Rochester)

Rural Iowa Independent Telephone Association (RIITA)

South Dakota Association of Telephone Cooperatives, Inc. (South Dakota)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)

United States Telephone Association (USTA)

United Telephone System Companies (UTS)

US Sprint Communications Company (US Sprint)

Parties Filing Reply Comments

ADAPSO

Ad Hoc

Aeronautical Radio, Inc. (ARINC)

Bell Atlantic

BellSouth

Contel Corporation (Contel)

GTE

State of Hawaii

U S West

Pacific Bell and Nevada Bell (Pacific)

PRTC

SWB

Teleconnect Long Distance Services & Systems Company (Teleconnect)

USTA

UTS

APPENDIX B

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 - ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.105 is amended by revising paragraph (b) to read as follows:

§ 69.105 Carrier Comon Line

*****

(b)(1) For purposes of this section and Section 69.113: (A) a carrier or other person shall be deemed to receive premium access if access is provided through a local exchange switch that has the capability to provide access for an MTS-WATS equivalent service that is substantially equivalent to the access provided for MTS or WATS, except that access provided for an MTS-WATS equivalent service that does not use such capability shall not be deemed to be premium access until six months after the carrier that provides such MTS-WATS equivalent service receives actual notice that such equivalent access is or will be available at such switch; (B) the term "open end" of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends); and (C) all open end minutes on calls with one open end (*e.g.*, an 800 or FX call) shall be treated as terminating minutes.

(2) For association Carrier Common Line tariff participants, (a) the premium originating Carrier Common Line charge shall be one cent per minute, and (b) the premium terminating Carrier Common Line charge shall be computed by subtracting the sum of the projected revenues generated by the originating Carrier Common Line charges (both premium and non-premium) of association Carrier Common Line tariff participants and of telephone companies that are not association Carrier Common Line tariff participants from the sum of the projected Carrier Common Line revenue requirements for association Carrier Common Line tariff participants and for telephone companies that are not association Carrier Common Line tariff participants, and dividing the remainder by the sum of the projected premium terminating minutes and a number equal to .45 multiplied by the projected non-

premium terminating minutes of association Carrier Common Line tariff participants and of telephone companies that are not association Carrier Common Line tariff participants.

(3) If the calculations described in Section 69.105(b)(2) result in a per minute charge on premium terminating minutes that is less than one cent, both the originating and terminating premium charges for the Carrier Common Line element of association Carrier Common Line tariff participants shall be computed by dividing the sum of the projected Carrier Common Line revenue requirements of such telephone companies and of telephone companies that are not association Carrier Common Line tariff participants, by the sum of the projected premium minutes and a number equal to .45 multiplied by the projected non-premium minutes of association Carrier Common Line tariff participants and of telephone companies that are not association Carrier Common Line tariff participants.

(4) The Carrier Common Line charges of telephone companies that are not association Carrier Common Line tariff participants shall be computed at the level of Carrier Common Line access element aggregation selected by such telephone companies pursuant to Section 69.3(e)(7). For each such Carrier Common Line access element tariff, (a) the premium originating Carrier Common Line charge shall be one cent per minute, and (b) the premium terminating Carrier Common Line charge shall be computed by subtracting the projected revenues generated by the originating Carrier Common Line charges (both premium and non-premium) from the Carrier Common Line revenue requirement for the companies participating in that tariff, and dividing the remainder by the sum of the projected premium terminating minutes and a number equal to .45 multiplied by the projected non-premium terminating minutes for such companies.

(5) If the calculations described in Section 69.105(b)(4) result in a per minute charge on premium terminating minutes that is less than one cent, both the originating and terminating premium charges for the companies participating in said Carrier Common Line tariff shall be computed by dividing the projected Carrier Common Line revenue requirement for such companies by the sum of the projected premium minutes and a number equal to .45 multiplied by the projected non-premium minutes for such companies.

(6) Telephone companies that are not association Carrier Common Line tariff participants shall submit to the Commission and to the association whatever data the Commission shall determine are necessary to calculate the charges described in this section.

3. Existing Section 69.113 is renumbered as Section 69.114, and the existing text of Section 69.113 shall become the new text of Section 69.114.

4. A new Section 69.113 is added to read as follows:

§ 69.113 Non-Premium Charges for MTS-WATS Equivalent Services

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive access that is not deemed to be premium access (as this term is defined in Section 69.105(b)(1)) in lieu of carrier charges that are computed in accordance with §§ 69.105, 69.106, 69.111 and 69.112.

(b) The non-premium charge for the Carrier Common Line element shall be computed by multiplying the premium charge for such element by .45.

(c) The non-premium charge for the Local Switching element shall be computed by multiplying a hypothetical premium charge for such element by .45. The hypothetical premium charge for such element shall be computed by dividing the annual revenue requirement for such element by the sum of the projected premium access minutes for such element for such period and a number that is computed by multiplying the projected non-premium minutes for such element for such period by .45.

(d) The non-premium charge or charges for the Transport element or elements shall be computed by multiplying the corresponding premium charge or charges by .45.

5. Section 69.201 is revised to read as follows:

§ 69.201 General

Notwithstanding Sections 69.4, 69.104, 69.106, and 69.111 through 69.112, charges for the access elements described in this Subpart shall be computed in accordance with this Subpart during the period commencing January 1, 1984 and ending December 31, 1992. This Subpart does not supersede Sections 69.106(c) through (e).

6. Section 69.205 is amended by revising paragraph (a), removing the existing text of paragraph (b), and by relettering the subsequent paragraphs as follows:

§ 69.205 Transitional Premium Charges

(a) Charges that are computed in accordance with this Section shall be assessed upon interexchange carriers or other persons that receive premium access in lieu of carrier charges that are computed in accordance with Sections 69.106, 69.111 and 69.112 of this Part if any carrier or other person does not receive premium access, as this term is defined in Section 69.105.

(b) Separate Local Switching transitional premium charges that are expressed in dollars and cents per access minute shall be computed for the LS1 and LS2 categories. The LS1 category shall consist of local dial switching for services other than MTS, WATS and services receiving access to the local switch equal to that received by MTS and WATS. The LS2 category shall consist of local dial switching for MTS, WATS and services receiving access to the local switch equal to that received by MTS and WATS.

(c) The charge for an LS2 premium access minute shall be computed by dividing the premium Local Switching revenue requirement by the sum of the projected LS2 premium access minutes and a number that is computed by multiplying the projected LS1 premium access minutes by the applicable LS1 transition factor. The charge for an LS1 premium access minute shall be computed by multiplying the charge for an LS2 premium access minute by the applicable LS1 transition factor. The premium Local Switching revenue requirement shall be computed by

subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for such element.

(d) During each of the following years the LS1 transition factor shall be:

(1) January 1, 1988 through March 31, 1989 - .78;

(2) April 1, 1989 through June 30, 1990 - .86;

(3) July 1, 1990 through June 30, 1991 - .905;

(4) July 1, 1990 through June 30, 1992 - .955; and

(5) July 1, 1992 through December 31, 1992 - .98

(e) Transitional premium charges that are computed in accordance with applicable requirements shall be assessed for the Transport element or elements. Such premium charges shall be designed to produce total annual revenue that is equal to the premium transport revenue requirement. The premium transport revenue requirement shall be computed by subtracting projected revenues from non-premium charges attributable to the Transport element or elements from the revenue requirement for such element or elements.

7. Section 69.206 should be removed.

8. Section 69.207 should be removed.

FOOTNOTES

[1] 47 C.F.R. § 69.105 (1987).

[2] *See* WATS Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, *Report and Order* (released Mar. 21, 1986) (hereinafter *WATS Order).*

[3] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 2953, 2954-2957, Appendix A at para. 12 (1987) (hereinafter *NTS Recovery Order).* This order did make certain minor modifications in the schedule for the subscriber line charge increases recommended by the Joint Board. *See also* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 2 FCC Rcd 2324 (1987) (hereinafter *Recommended Decision).*

[4] *See* Exchange Carrier Association Tariff F.C.C. No. 1, 17th Revised page 118.2. In ruling on these 1988 access tariff reductions, the Common Carrier Bureau denied a request from NECA to continue a *de minimis* charge on originating minutes while also permitting reductions to the terminating end CCL charge. The United States Telephone Association (USTA) had supported NECA's proposal, and suggested that the originating rate be set at .50 cents per minute on the effective date of the access tariffs, January 1, 1988. The Bureau said that it would be inappropriate for the Bureau to waive this Commission's rule that imposed a "freeze" on the terminating charge without appropriate proceedings. Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281, 1310 (1987).

[5] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishement of a Joint Board, *Memorandum Opinion and Order on Reconsideration and Order Inviting Comments*, 3 FCC Rcd 4543 (1988) (hereinafter *NTS Recovery Reconsideration Order), petition for review pending, Public Service Commission of the District of Coulmbia v. FCC*, D.C. Cir. No. 88-1661 (petition filed Sept. 12, 1988).

[6] *NTS Recovery Reconsideration Order* at para. 41.

[7] This rule would apply to carriers regardless of whether they consolidate their filing into a single tariff for a group of affiliated companies, or file on a company-by-company basis. *See infra* note 64.

[8] Parties filing comments and reply comments are listed in Appendix A. We use the abbreviations that appear in that Appendix throughout this order. In addition to its substantive points as described below, NECA emphasizes that we should resolve this issue as soon as possible to facilitate the tariff preparation process. NECA Comments at 6.

[9] *See, e.g.*, USTA Comments at 6; NECA Comments at 5-7; BellSouth Comments at 4; GTE Comments at 1, 4-7; NTCA Comments at 4; OPASTCO Comments at 1-2; PRTC Comments at 2; Rochester Comments at 1; RIITA Comments at 1-2; South Dakota Comments at 1; SWB Comments at 2-3; SNET Comments at 1-3; U S West Comments at 5-12; and UTS Comments at 1. NYNEX suggests that LECs be allowed to choose either to recover all CCL costs through the terminating charge, or to set equalized rates. NYNEX at 4.

[10] *See* BellSouth Comments at 4; BellSouth Reply at 2-3.

[11] USTA Comments at 9-10. USTA also suggests that we should consider allowing alternative approaches for recovering NTS costs, such as a monthly presubscribed line charge or an assessment that matches cost recovery with particular groups of users. *Id.* at n. 10. *See also* GTE Reply at 5.

[12] GTE Reply at 4-5. UTS observes that the industry Unity 1-A agreement that proposed the pooling modifications to the CC Docket 80-286 Joint Board contemplated pricing flexibility. It also contends that a flexible approach would help to eliminate regional fund transfers among LECs. UTS Comments at 3-4, 5-6. *See also* GTE Reply at 5.

[13] *See* Ad Hoc Reply at 11-12; ADAPSO Reply at 14-15; and Teleconnect Reply at n. 2, *quoting* the *NTS Recovery Reconsideration Order* at n. 96; ARINC Reply at 8.

[14] *See* Ad Hoc Reply at 12-13, *citing* Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, FCC 86-145 (released Apr. 28, 1986).

[15] ADAPSO Reply at 15-16.

[16] *Id.* at 8-10; Teleconnect Reply at 3-4. Teleconnect suggests that flexibility will result in revenue shortfalls to the pool.

[17] Ad Hoc Comments at 3; ADAPSO Reply at 16-17; ARINC Reply at n. 24, 8-10. Furthermore, ARINC suggests that the LECs' requests amount to an attempt to expand their strategic pricing policies to CCL charges. ARINC Reply at 9-10.

[18] Teleconnect Reply at 4. PRTC responds to the rate churn concern by claiming that access services of depooling carriers will experience significant price changes regardless of what approach is adopted in this proceeding, and that our review of any tariffed rate changes these carriers might file would make it difficult for them to engage in rate churn. PRTC Reply at 7.

[19] *See* Ad Hoc Comments at 3; Ad Hoc Reply at 7-14; ADAPSO Reply at 11-18; Ameritech Comments at 2-3; ARINC Reply at 2-10; CBT Comments at 1; Microtel Comments at 1-3; MTCA Comments at 1; and Teleconnect Reply at 1-2. Ameritech notes that its preferred long-term solution is a flexible CCL structure that enables a LEC to recover its NTS requirement in the manner it deems best. As an alternative to equalized CCL charges, Cincinnati Bell would support according LECs flexibility in setting their CCL charges.

[20] NECA Comments at 5-7; Lincoln Comments at 3; NTCA Comments at 1-4; OPASTCO Comments at 2-3; Pacific Reply at 3; RITTA Comments at 1-2; and South Dakota Comments at 1. *See also supra* paras. 8 & 9. BellSouth supports according LECs flexibility to assess an originating charge above zero as the best

approach, and supports an equalized charge if this Commission decides that such flexibility is not appropriate. BellSouth Comments at 4.

[21] Ameritech Comments at 4; Pacific Reply at n. 3.

[22] *See, e.g.*, NECA Comments 3-4; Lincoln Comments at 2; BellSouth Comments at 3; CBT Comments at 3; Microtel Comments at 2; NTCA Comments at 2; RITTA Comments at 1-2; and South Dakota Comments at 1.

[23] Lincoln Comments at 2. Lincoln explains that the proliferation of such services means that LECs must base their CCL charge billing revenue recovery and rate development functions on information provided by IXCs. Lincoln claims that, since this information can be inaccurate and is often not provided in a timely manner, LECs are faced with the possibility of substantial, unforeseeable, billing adjustments.

[24] NECA Comments at 3-4.

[25] ADAPSO references a pending class action litigation in which a number of resale carriers have challenged the manner in which LECs have collected bifurcated CCL charges, and ARINC mentions ongoing difficulties in determining which entities and which services are eligible for the credits. *See* ARINC Reply at 6-7; ADAPSO Reply at 7-8, *citing Long Distance / USA v. Southern Bell Telephone and Telegraph Co.*, C.A. 88-1477 (D.D.C.).

[26] NTCA Comments at 2-3; *see also* USTA Comments at 3; MTCA Comments at 1.

[27] NECA Comments at 4-5; OPASTCO Comments at 2.

[28] *See, e.g.*, CBT Comments at 3-4; Lincoln Comments at 1-3; NECA Comments at 5; OPASTCO Comments at 2; NTCA Comments at 3; South Dakota Comments at 1; and ADAPSO Reply at 10-11.

[29] ADAPSO Reply at 5-7.

[30] Microtel Comments at 2.

[31] Ad Hoc Comments at 5; Ad Hoc Reply at 4-5; ARINC Reply at 7. Ad Hoc suggests that even a promise that the bifurcated CCL charge would expire as of a specified date after March 31, 1989, would not add certainty to the switched access market because this Commission has already twice extended the expiration date.

[32] *See infra* para. 26.

[33] Ad Hoc Reply at 9-10.

[34] Ameritech Comments at 3-4. Ameritech further observes that a bifurcated structure will make it harder in the future for LECs to forecast the service mix of their customers.

[35] Ad Hoc Comments at 3-4; Ad Hoc Reply at 3-4, 7-8; ADAPSO Reply at 2-5; ARINC Reply at 3-4. *See also* Teleconnect Reply at n. 1. Ad Hoc contends that this discrimination is especially inappropriate given that demand for services with one open end has declined, while demand for services with two open ends has increased. ADAPSO notes that the problem is most acute for users of WATS and 800 Services, who have historically borne, in its view, a disproportionate share of NTS costs.

[36] ADAPSO Reply at 2-5, 12-13.

[37] *See* Microtel Comments at 1-2; BellSouth Comments at 2-3; CBT Comments at 2-3; Lincoln Comments at 2-3; MTCA Comments at 1; South Dakota Comments at 1; and Ad Hoc Reply at 1-2.

[38] Ad Hoc Reply at 7-8; ADAPSO Reply at 16-17; and ARINC Reply at 4-5.

[39] *See, e.g.*, Microtel Comments at 2; BellSouth Comments at 2-3; NTCA Comments at 2; OPASTCO Comments at 2; ARINC Reply at 5; and Contel Reply at 2-3. SWB, U S West and UTS address the technical and economic obstacles to terminating bypass in the course of concluding that originating end bypass is much more likely, but each acknowledges that the threat of terminating end bypass is not entirely unfounded. *See infra* paragraph 27.

[40] MCI Comments at 1; US Sprint Comments at 5. AT&T does not take a formal position with respect to whether or not charges should be bifurcated.

[41] *See* OPASTCO Comments at 1-2; NTCA Comments at 3; and USTA Comments at 8-9 (in the alternative). *See also* BellSouth Comments at 4; *supra* note 20.

[42] Contel Reply at 2-3. Contel supports flexibility; it does not specifically advocate bifurcated rates.

[43] *See, e.g.*, USTA Comments at 6; GTE Comments at 1, 4-7; PRTC Comments at 2; Rochester Comments at 1, 5; SWB Comments at 2-3; SNET Comments at 1-3; U S West Comments at 5-12; and UTS Comments at 1. *See also supra* paras. 8 & 9. UTS proposes that, if we choose not to allow flexibility, the residual CCL costs not recovered through subscriber line charges should be recovered as follows: "(1) residual costs of 4.33 cents or less per minute of use ("MOU") should be recovered through the terminating charge; (2) residual costs above 4.33 cents per MOU should be recovered through the originating charge, but only up to the hypothetical nationwide average CCL charge; and (3) any residual costs above the sum of 4.33 cents per MOU and the nationwide average should be added to the terminating charge." UTS Reply at 4.

[44] *See* US Sprint Comments at 5; NYNEX Comments at 3; PRTC Comments at 2-3; 5-7; SWB Comments at 9; and Rochester Comments at 1-2.

[45] *See, e.g.*, MCI Comments at 7-9; US Sprint Comments at 4; Bell Atlantic Comments at 5; Rochester Comments at 8-9; U S West Comments at 9; U S West Reply at 9; and UTS Comments at 6-7.

[46] GTE Comments at 6.

[47] Bell Atlantic Comments at 3.

[48] AT&T Comments at 2-5. While AT&T reaffirms its commitment to maintain geographically averaged rates, it does state that its continued ability to average its rates is affected by the extent to which access charges are geographically deaveraged, and the extent to which its IXC competitors deaverage their prices in response. The State of Hawaii responds to AT&T's comments by expressing concern that AT&T may be signalling its intention to depart from geographic rate averaging, and urges the Commission to act affirmatively to prohibit geographic deaveraging. State of Hawaii Reply Comments at 1-6.

[49] GTE Reply at 6.

[50] *See, e.g.*, Bell Atlantic Comments at 4-5; GTE Comments at 6-7; NYNEX Comments at 4-5; Rochester Comments at 10; and U S West Comments at 8.

[51] UTS Comments at 7. UTS also expresses the view that only a few of the companies that leave the pool will have CCL charges that are higher than those of other regions, and, based on this premise, concludes that there will not be significant traffic flow distortions among regions or additional pressure to deaverage rates.

[52] *See e.g.*, Bell Atlantic Comments at 5; BellSouth Reply at n. 5.

[53] GTE Comments at 6-7; GTE Reply at 5. *See also* Bell Atlantic Comments at 5; Bell Atlantic Reply at 3; and NYNEX Comments at 4.

[54] PRTC Reply at 7-8.

[55] MCI Comments at 4; US Sprint Comments at 3-4. *See also* Rochester Comments at 7; GTE Reply at 6-7.

[56] Bell Atlantic Reply at 3.

[57] *See, e.g.*, Bell Atlantic Comments at 4; MCI Comments at 5; NYNEX Comments at 3; PRTC Comments at 3-5; SWB Comments at 3-4; Rochester Comments at 1, 5-6; US Sprint Comments at 2-3; U S West Comments at 7; UTS Comments at 4-5; and UTS Reply at 2-3.

[58] *See, e.g.*, SWB Comments at 4-6; SWB Reply at 2-3; Bell Atlantic Comments at 2-3; Bell Atlantic Reply at 2; PRTC Comments at 4-7; PRTC Reply at 6-7; Rochester Comments at 8; U S West Comments at 7-8; and US Sprint Comments at 2-3.

[59] SWB Comments at 7-8; SWB Reply at n. 3.

[60] Bell Atlantic Comments at 2; U S West Comments at 7. NYNEX further notes that, to the extent equalized rates increase the incidence of interstate bypass, equalized rates could also increase bypass of intrastate services, which would affect intrastate cost recovery. NYNEX Comments at 5.

[61] UTS Comments at 5.

[62] GTE Comments at 8.

[63] Although we recognize that a bifurcated scheme with a zero originating charge does help to deter bypass and offers several other advantages, that method also can cause administrative difficulties for access charge billing and for this Commission's tariff review process, and would create undesirable incentives for terminating end bypass. Equalization offers many administrative benefits and would eliminate the large differential between originating and terminating charges, but this method could make it more difficult for LECs to address bypass or to attract IXCs to provide and market originating interexchange service in LEC service areas.

[64] Revisions to our Part 69 rules to reflect this change are set forth in Appendix B. In order to incorporate this change, we have consolidated and reorganized certain sections of Subparts B and C of the Part 69 rules, as reflected in full in Appendix B. We believe that a number of carriers that have elected to leave the common line pool as of April 1989 intend to file a single, consolidated tariff for their affiliates. Others may elect to file tariffs for each individual company. The rule we adopt today would apply to either consolidated or individual CCL tariffs, whichever the carrier elects to file.

[65] *See supra* paras. 8-9 & 21.

[66] *NTS Recovery Reconsideration Order* at n. 96.

[67] *See supra* para. 27.

[68] Thus, for example, if a LEC has an equalized rate of two cents on each end and it had an equal number of originating and terminating minutes, it would have an originating rate of one cent, and a terminating rate of three cents. (Of course, in the more usual case, a LEC with more terminating than originating minutes would not have to raise its terminating rate to three cents to compensate for dropping its originating rate to one cent.)

[69] *See supra* para. 26. These parties apparently contend this is true because LECs would recover less from one open ended services under equalized rates than under a bifurcated rate scheme that assesses a high terminating rate on one open ended services. Such one open ended services often use special access facilities on the "closed" end.

[70] Some parties suggest that if we return to equalized charges we should provide some type of transition to ease these types of administrative concerns. *See supra* para. 12. Because we expect that our decision will minimize such rate churn, we do not consider it necessary to provide for a transition mechanism.

[71] *See* Letter from George D. Morlan, AT&T, to H. Walker Feaster, Secretary, FCC, dated Sept. 13, 1988.

[72] When we instituted the interim bifurcated CCL charges, we also decided that services with one open end should be assessed the higher "terminating" CCL charge on open end minutes even if that open end connection carries originating traffic. We found that these minutes should be treated like terminating MTS minutes for cost recovery purposes since those services were less subject to bypass. *WATS Order* at para. 53.

[73] *See supra* para. 22. The billing credit arrangements described in the comments include situations in which the IXC either provides the LEC with a factor representing the percentage of its 700, 800 and 900 originating traffic that terminates on a common line, which the LEC (or NECA, as the administrator of the pooling LECs' common line tariffs) then applies to the IXC's total minutes to determine the number of minutes that should be billed the terminating rate, or reports the number of actual 700, 800 and 900 minutes that terminate on a common line to the LEC, so that the LEC (or NECA) can adjust the IXC's bill to reflect the fact that these minutes were improperly billed the terminating rate.

[74] The concern that these derived terminating MOU figures are likely to be less accurate than measured minutes is exacerbated by two factors. First, since the originating to terminating minute ratios used to derive the terminating MOUs are based on historical traffic patterns, the ratios can quickly become outdated as traffic patterns change. Second, we understand that the zero originating rate has resulted in some uncertainty regarding the accuracy of originating MOU figures provided by carriers that have the capability to measure both terminating and originating minutes, apparently because no billings were directly associated with the originating MOUs, and these carriers accordingly had less incentive to provide reliable data for these minutes. Since these data provide the basis for the historical ratios used by carriers that are not able to measure terminating traffic, the accuracy of these ratios are further drawn into question. Under our approach, however, some billings will be associated with the originating end minutes, and accordingly the concern that figures for originating minutes were not being accurately maintained as a result of the zero originating charge will be resolved.

[75] *See supra* para. 14.

[76] *See* Semi-Annual Study on Telephone Trends Brings Good News for Consumers, FCC No. 3981, at 11 (released Aug. 1, 1988).

[77] In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Notice of Proposed Rule Making* in the Federal Register. Because of the nature of local exchange and access services, we have concluded that small telephone companies are dominant in their field of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-89 (1983). Thus, we are not required by the terms of that Act to apply the formal procedures set forth herein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate procedures to analyze the effect of proposed regulations on small telephone companies. As part of our analysis of the issues discussed in this order, we have considered the impact on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines. We conclude that our changes will not have an adverse effect on those companies and should benefit such carriers by enabling them to combat uneconomic bypass and to attract IXCs to provide interexchange service to their serving areas.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PLAN TO OFFER COMPARABLY EFFICIENT INTERCONNECTION TO PROVIDERS OF DATA PROCESSING SERVICES

On June 5, 1989, Bell Atlantic filed a comparably efficient interconnection (CEI) plan to provide certain data processing and computer storage activities through non-telephone company entities. Bell Atlantic proposes to offer timesharing services, facilities management services, and other processing and storage services such as standby back-up processing and "electronic vaulting."

According to Bell Atlantic, it will provide storage and processing of customer-provided information in computer systems that it will operate that will not be used to provide telephone service. Bell Atlantic states that the systems will be connected with terminals or computers on the customers' premises, and that the systems will use a variety of basic communications services using standard, existing interfaces. In order to provide these data processing services, Bell Atlantic's data processing operation will subscribe to a number of existing and underlying basic services.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before Bell Atlantic can begin implementing the proposed service. Bell Atlantic states that no new basic services will be required, and that no new network interface specifications will be deployed. However, in the future if new services are required, Bell Atlantic will amend its plan.

According to Bell Atlantic, it will account for the joint and common costs of the service pursuant to its Part 32 cost allocation manual. Bell Atlantic also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by **July 14, 1989,** and reply comments by **July 28, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Atlantic's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CARIBBEAN SATELLITE CORPORATION — File No. I-T-C-89-087

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 14, 1989; Released: June 23, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 30, 1988 by Caribbean Satellite Corporation (CaribSat), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on April 19, 1988. No comments were received.

2. The applicant is a non-dominant domestic facility-based and resale common carrier providing service between Puerto Rico and the continental U.S. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by CaribSat.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-087, IS GRANTED, and CaribSat is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 8, 1989

Released: June 26, 1989

Jill Abeshouse Stern
Miller, Young & Holbrooke
1225 Nineteenth Street, N. W.
Washington, D. C. 20036

In re: CAR-29924-09
WDP-498
Laredo, Texas

Dear Ms. Stern:

This is in regard to a Petition to Deny filed on behalf of your client, the City of Laredo, Texas, against the above-referenced application for transfer of control of Cable Television Relay Service (CARS) station WDP-498, Laredo, Texas, from Rogers U. S. Holdings Limited to KBL Cable, Inc. (KBL). The application was filed on September 23, 1988 and placed on Public Notice on October 5, 1988. Your petition was filed with the Commission on November 4, 1988. On November 17, 1988, oppositions to your petition were filed by Rogers Cablesystems of the Southwest, Inc. (Rogers) and by KBL. On November 30, 1988, you filed a reply to the opposition of KBL. On December 7, 1988, you filed a reply to the opposition of Rogers.

In your petition, you argue that since the local franchising authority has not yet granted a transfer of the franchise, KBL is not yet eligible for a CARS license under Section 78.13 of the Commission's rules. You cite *C & S Trenching Co., Inc.*, 2 FCC Rcd 116 (1987) (*C & S*) for the proposition that in order to be eligible for a CARS license, an applicant must establish that it is a cable television operator and the holder of a franchise to serve the relevant location. Since the City of Laredo has not yet made a determination approving the transfer of the franchise to KBL, you conclude that it is not at present eligible as a transferee of the above-referenced CARS license. You maintain that grant of the application would run counter to the Commission's rules and precedent and would also interfere with the local franchising process. You request that the Commission deny or dismiss the application, or, in the alternative, defer action pending the outcome of the local franchise review process.

In its opposition, KBL points out that Rogers will continue to hold the franchise and CARS license and contends that the franchising requirements of the Communications Act are thereby satisfied. KBL argues that *C & S* is not applicable to the instant situation in that *C & S* dealt with the addition of a new path to a receive site for which the licensee did not hold a franchise, as opposed to the transfer of an existing franchise. KBL categorizes the Commission's consent as "permissive" rather than "directive" in nature, which "simply authorizes the transfer of any licenses for FCC purposes and leaves its to the parties to obtain any other required governmental or contractual consents (footnote omitted)." KBL points to the Commission's "historical disinclination" to involve itself in the franchise transfer process and become involved in local disputes, citing *Memorandum Opinion and Order in MM Docket No. 84-1296*, 60 RR 2d 514, 518 (1986) *aff'd sub nom. ACLU v. FCC*, 823 F. 2d 1554 (D.C. Cir. 1987). In that matter, the Commission stated that it will "entertain disputes only involving matters that directly impinge on a national policy concerning cable communications." KBL concludes that "the question of whether a particular transaction requires local consent under the terms of a franchise or other local law does not fall within this standard."

Rogers, in its opposition, asserts that the application "seeks only the Commission's *consent* to the proposed transfer, the grant of which, without more, would not constitute a transfer of the CARS license to an unfranchised entity (emphasis in original)." Rogers states that if the Commission withholds or refuses consent until the local franchise transfer is granted, consummation of the transaction will be delayed without any corresponding public interest benefit attendant to the delay. Rogers notes, as does KBL, that the Commission process assumes that a grant of consent is precedent to the actual transfer of the local franchise. Opponents point out that FCC Form 371-C, which issues FCC consent to the application, states that "the actual consummation of voluntary transactions shall be completed within sixty (60) days from the date hereof."

In your reply to KBL's opposition, you repeat the arguments made in your Petition to Deny and emphasize that "[t]he City merely seeks to preserve the status quo until the local franchise process runs its course and to prevent the CARS transfer process from distorting or overriding municipal franchising authority." You state that the City of Laredo may "suffer significant harm" if the FCC acts upon the license transfer prior to approval of the franchise transfer by the city. You base this upon your contention that the transferee, once approved as a CARS licensee, may "effectuate the transfer and commence operations without obtaining local franchise transfer approval." You are concerned that this "end run" would allow the transferee to "circumvent the local process, avoid the City's public interest determination and make it more difficult for the City to convince a court to 'undo' the transaction."

In your opposition to Rogers' reply, you argue that the proposed acquisition of the cable system is not enough to establish eligibility and that the applicant must show its qualifications as the owner of the system. You address Rogers' concerns regarding delay should we wait until franchising approval is granted by suggesting that the parties may seek Commission approval once the local franchising process is granted.

C & S, the matter in which the Commission acknowledged the Cable Act's mandate for local franchising of cable operators, sets out a two prong test for CARS eligibility. To be eligible for licensing, "an entity must establish that it meets the definition of a cable television system and that it holds a franchise to serve the relevant location." *C & S*, *supra*, at p. 1471.

We agree with opponents' contention that in the context of a transfer or assignment of license, rather than an initial licensing, the holding of *C & S* is not dispositive.

In *C & S*, the applicant sought to establish its qualifications for a new path to a location in a community where it did not hold a franchise, nor was there any evidence that *C & S* sought the transfer or assignment of a currently franchised cable system in the relevant community. In the initial licensing case, such as *C & S*, granting CARS authorization without evidence of a current franchise, even conditionally, would render the subject CARS channels unavailable to other potential applicants with no guarantee that the conditional permittee will be chosen as the franchisee and actually use the spectrum involved. Such a problem does not arise where the cable system already exists and an applicant is merely proposing to transfer or assign a CARS facility already using licensed CARS channels. It is clear in the instant matter that a currently operating and franchised cable system is the subject of the application. This distinction provides the basis for our differing treatment of applicants in initial licensing as opposed to transfer or assignment applications.

Our grant of consent in transfers and assignments of CARS licenses is permissive in nature; such a grant does not compel the transfer or assignment to go forward. Consequently, our action approving a CARS transfer or assignment is not dependent on prior local approval of a proposed transferee or assignee so long as we are satisfied that a cable television system exists and is currently operating under a properly sanctioned local franchise. Our Form 371-C, which issues consent to the transfer or assignment application, presumes in its language, as previously stated, that our grant of consent is precedent to the actual transfer of the franchise. Moreover, processing of sales applications without reference to the timing of local franchising proceedings aids in the smooth flow of our workload and, ultimately, in the efficient use of our resources which enhances our ability to provide service to the public.

Contrary to the City of Laredo's contention, we do not agree that our consent to the instant CARS application will facilitate a circumvention of its local franchising process. The City of Laredo will continue to control an orderly transition of the franchise regardless of our grant of the CARS license in question. We wish to make it clear that our approval of a CARS transfer or assignment application in no way interferes with the rights of local governments to approve or disapprove the transfer of a franchise. To assure no misunderstanding on this point, we shall impose an appropriate condition to the transfer in this proceeding.

In light of the above, we find that petitioner has failed to raise a substantial and material question of fact that grant of the application would be inconsistent with the public interest. Accordingly, the Petition to Deny CAR-29924-09, filed by the City of Laredo, Texas IS DENIED, and said application to transfer control of CARS station WDP-498, Laredo, Texas, IS HEREBY GRANTED, subject to the condition that the transaction shall not be consummated until the City of Laredo approves the transfer of the franchise to KBL Cable, Inc.

Sincerely,

Roy J. Stewart
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Applications of

VITACOM SATELLITE SERVICES, CORPORATION — File Nos. 628-639-DSE-P/L-86

For Authority to Construct and Operate a Network of Small Antenna Earth Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: May 5, 1989; Released: June 26, 1989

By the Domestic Facilities Division:

1. Vitacom Satellite Services, Corporation (Vitacom)[1] requests authority to construct and operate a private communications network using large numbers of small earth stations to be operated in the 12/14 GHz frequency bands. Vitacom's network will consist of up to ten thousand 1.8, 3.7 and 4.5 meter fixed and temporary-fixed earth stations installed at various locations within the continental United States, Hawaii and the U.S. Virgin Islands communicating via a 12/14 GHz fixed hub station located in Mountain View, California. Although no petitions to deny were filed against the Vitacom applications, comments were submitted by Bell Atlantic Network Services, Inc. (Bell Atlantic), NYNEX Service Company (NYNEX) and Telcom General Corporation (Telcom General).

2. Both Bell Atlantic and NYNEX request that the Commission condition the Vitacom licenses on Vitacom providing information on earth station operating areas and specific frequencies to Local Television Transmission Service (LTTS) operators, and to designate a point of contact for frequency coordination with those users.

3. The concerns of Bell Atlantic and NYNEX are rendered moot by the *VSAT Order* [2] which requires all VSAT operators to maintain a point of contact from which LTTS operators can obtain the information needed to coordinate their systems' and VSAT systems' operations. Further, Vitacom provides "point of contact" information to Bell Atlantic and NYNEX in its Consolidated Reply Comments.

4. Telcom General argues that EIRP density levels proposed by Vitacom in its application threaten the 1.2 meter private satellite network Telcom General proposes. [3] Telcom General states that the proposed EIRP density level for Vitacom's operations – 36.9 dBW/4 KHz – represents a significant increase over the 27.2 dBW/4 KHz EIRP density approved for a similar network in *Schlumberger Technology Corporation*, FCC Mimeo No. 4658, released June 7, 1984.

5. Subsequent to the issuance of *Schlumberger* and the filing of Telcom General's comments, the Commission issued the *VSAT Order*, a general declaratory order that set the licensing procedures for satellite communications networks using large numbers of earth stations. The *VSAT Order* also established the technical standards and power density limits for VSAT systems, superseding the conclusions reached in *Schlumberger*. For the inbound uplink, the power density limit into a typical 1.2 meter earth station is set at -14.0 dBW/4 KHz; and for the outbound link, a maximum satellite carrier EIRP density limit is set at +6.0 dBW/4 KHz within the service area. The requirements of the *VSAT Order* have been satisfied by the Vitacom applications and its subsequent amendments, rendering Telcom General's comments moot. Consequently, Vitacom's applications are hereby granted.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that application File Nos. 628 through 639-DSE-P/L-86 ARE GRANTED AND Vitacom Satellite Services, Corporation IS AUTHORIZED to construct and operate a network of up to ten thousand fixed and temporary-fixed earth stations in accordance with the technical parameters and formal conditions specified in the instruments of authorization. The licensee shall annually notify the Commission of the number of each type of station actually constructed and placed into operation within that year.

7. IT IS FURTHER ORDERED that all of the earth stations in this network must operate within the baseline parameters set forth in the *VSAT Order*. The licensee bears the risk that future changes in satellite location or transponder assignment will require adjustments of the carrier frequencies and system operating parameters in order to avoid adjacent satellite interference.

8. IT IS FURTHER ORDERED that the effective date of this authorization is the adopted date. Vitacom Satellite Services Corporation is afforded thirty days from the date of the release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were originally filed in the name of Vitalink Satellite Services, Inc. (Vitalink). Since that time, Vitalink filed a major amendment to assign the above referenced applications to Vitacom. *See* Public Notice Report No. DS-834, March 8, 1989. The Commission received no comments on the amendment. Therefore, we grant the parties authority to assign the Vitalink applications to Vitacom.

[2] Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, Mimeo No. 3588 (released April 9, 1986) (VSAT Order).

[3] File No. 1334-DSE-P-85 (Filed April 11, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MIRACLE STRIP COMMUNICATIONS, INC. Fort Walton Beach, Florida	**BC DOCKET NO. 81-856** File No. BPH-790509AA
JUANINA, INC. OF FORT WALTON BEACH Fort Walton Beach, Florida	**BC DOCKET NO. 81-858** File No. BPH-791114AD
PINNACLE BROADCASTING CORPORATION Fort Walton Beach, Florida	**BC DOCKET NO. 81-859** File No. BPH-791115AB
DA-GON BROADCASTING, INC. Fort Walton Beach, Florida	**BC DOCKET NO. 81-861** File No. BPH-791115AI

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1989; Released: June 23, 1989

By the Commission:

1. This proceeding now involves four mutually exclusive applications for authority to construct a new FM station on channel 243C in Fort Walton Beach, Florida. Based upon its resolution of the standard comparative issue, the Review Board denied the applications filed by Miracle Strip, Juanina, Pinnacle, and Da-Gon, and granted the application filed by a fifth applicant, Vacationland Broadcasting Company, that sought authority to move the facilities of station WFTW-FM from channel 258A to channel 243C. *Vacationland Broadcasting Co.*, 97 FCC 2d 485 (Rev. Bd. 1984). The Commission denied applications for review filed by Juanina, Miracle Strip, Da-Gon, and Pinnacle, but modified one aspect of the Board's diversification analysis. 58 RR 2d 439 (1985).

2. Pinnacle, Miracle Strip, Juanina, and Da-Gon sought judicial review of the Commission's determination that the grant of Vacationland's application would best serve the public interest. *Pinnacle Broadcasting Corp. v. FCC*, No. 85-1364 (D.C. Cir. filed June 17, 1985). By its order of December 23, 1985, the court remanded the proceeding to the Commission so that it could reconsider one aspect of its diversification analysis. On remand, the Commission reaffirmed the grant of Vacationland's application. 103 FCC 2d 1191 (1986), recon. dismissed, 3 FCC Rcd 754 (1988).

3. On January 29, 1988, the Commission, at Vacationland's request, dismissed its application with prejudice, and directed the General Counsel to seek a further remand so that the Commission could make a grant to the comparatively superior applicant. *Vacationland Broadcasting Co.*, 3 FCC Rcd 754, 755 ¶ 8 (1988). By its order of May 3, 1988, the court granted the Commission's unopposed motion for remand. In remanding the proceeding in *Pinnacle Broadcasting Corp. v. FCC* to the Commission, the court did not retain jurisdiction over the case.

4. In view of Vacationland's withdrawal from this proceeding, we must determine which of the remaining applicants will best serve the public interest. Because the Review Board concluded that Vacationland was the clear winner, it did not identify a runner-up among the other four competing applicants: The Board found only that Miracle Strip and Juanina were in a "second tier . . . beneath Vacationland" and that Pinnacle and Da-Gon were on a "third tier . . . clearly out of the running." 97 FCC 2d at 496 ¶ 22 n.2. However, the ALJ and the Review Board made all the relevant factual determinations concerning the remaining applicants. Thus, we need not remand for further proceedings in order to determine which applicant will best serve the public interest.

5. We conclude that Juanina, Miracle Strip, Pinnacle, and Da-Gon each have the basic qualifications to be a Commission licensee. The ALJ found all four applicants fully qualified but assessed comparative demerits against Da-Gon for errors in its ascertainment survey and for violations of 47 C.F.R. § 73.3526, which requires applicants to maintain a public file. 97 FCC 2d at 512 ¶¶ 50-51. The Board affirmed the assessment of comparative demerits against Da-Gon. 97 FCC 2d at 497 ¶ 27.

6. After the Board's decision in this proceeding, the Commission abandoned its practice of awarding *comparative* demerits for rule violations. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1208 ¶ 56, 1230-32 ¶ 105 (1985). *See Hampshire County Broadcasting Co.*, FCC 88-314 ¶ 10 (Oct. 19, 1988), 3 FCC Rcd 6137, 6138 ¶ 10 (1988) (unintentional failure to provide information under 47 C.F.R. § 1.65 has no comparative significance).

7. Accordingly, we find that the survey errors and the rule violations have no bearing on Da-Gon's comparative standing in this proceeding. Moreover, we find no basis in the record before us for concluding that these matters warrant Da-Gon's absolute disqualification. In this regard, the ALJ did not disqualify Da-Gon because he concluded that the errors in Da-Gon's ascertainment survey and the rule violations were the result of carelessness rather than a deliberate attempt to misrepresent material facts to the Commission. 97 FCC 2d at 511-12 ¶¶ 49-50. However, because these matters reflected a disregard for the accuracy of information supplied to the Commission that could not be condoned, the ALJ determined that comparative demerits were warranted. *Id.* Neither the Board nor the Commission disturbed the ALJ's determination that Da-Gon's errors were not the result of a deliberate attempt to deceive the Commission, and we find no basis for reexamining this question at this time.

8. Having determined that all four applicants are fully qualified, we turn to the standard comparative issue. The criteria that must be considered in selecting among basically qualified applicants are set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Under the *1965 Policy Statement*, two public interest objectives govern this selection: (1) diversification of control of the media of mass communications; and (2) best practicable service to the public. *Id.* at 394-95 ¶ 1.

9. The four remaining applicants are equal on the critical diversification criterion. As the Board found, Miracle Strip, Juanina, and Da-Gon have no attributable media interests. *Vacationland*, 97 FCC 2d at 487-88 ¶ 3. Pinnacle owns less than 1 percent of the stock of a multiple station owner. This interest is too insignificant to have any diversification consequences under Commission precedent. *See Washington's Christian Television, Inc.*, 59 RR 2d 1679, 1682 ¶ 14 & n.13 (1986), aff'd by judgment sub nom. *Washington's Christian Television Outreach, Inc. v. FCC*, No. 85-1649 (D.C. Cir. Dec. 17, 1987).

10. Turning to the best-practicable-service criterion, the only factors at issue in this case are auxiliary power and the extent to which the owners of each applicant propose to be integrated into station management. As the Board found (97 FCC 2d at 497 ¶ 25), Pinnacle is entitled to a slight comparative preference under the best-practicable-service criterion as the only applicant proposing auxiliary power. *Addendum to Policy Statement of July 28, 1965, On Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

11. Integration of ownership and management has long been a factor of substantial importance in securing best practicable service to the public. *1965 Policy Statement*, 1 FCC 2d at 395 ¶ 2. In assessing an integration proposal, the Commission evaluates the qualitative attributes of owners who will occupy important managerial and policymaking positions because "[i]f an owner actually exercises day-to-day control over the enterprise, it becomes relevant to evaluate an application in terms of the individual attributes of the owner." *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 605-05 (D.C. Cir. 1984). Qualitative attributes that the Commission considers include local residence, civic participation, minority ownership, female ownership, and broadcast experience. *1965 Policy Statement*, 1 FCC 2d at 395 ¶ 2; *TV 9, Inc. v. FCC*, 495 F.2d 929, 941 & nn.1-2 (D.C. Cir. 1973); *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264 & n.3 (1984).

12. In its decision in this proceeding, the Board credited Miracle Strip and Juanina with 100 percent full-time integration and Da-Gon with 73 percent full-time integration. *Vacationland*, 97 FCC 2d at 495 ¶ 20. The Board also awarded Pinnacle 70 percent full-time quantitative credit for the proposal that Pinnacle's two 35 percent owners, William Seaver and James Wesley, would be integrated at least 40 hours per week, and 15 percent substantial-time credit for the proposal that its 15 percent owner, Brenda Wesley, would be integrated at least 30 hours per week. *Id.* at 493 ¶ 16. The Board refused to award any integration credit for the proposal that Pinnacle's other 15 percent owner, Wilma Seaver, work at least 30 hours per week at the station because it concluded that her proposed position was not managerial. *Id.* at 493-94 ¶ 17. Based on these findings, the Board concluded that Juanina and Miracle Strip have clear quantitative advantages over Pinnacle and Da-Gon that cannot be overcome by the qualitative attributes of the integrated owners of Pinnacle and Da-Gon. 97 FCC 2d at 495 ¶ 21.

13. We recently adopted a new, more precise method of comparing competing integration proposals when part-time employment is involved. *Omaha TV 15, Inc.*, FCC 88-371 (Dec. 19, 1988), 4 FCC Rcd 730, 734 ¶ 31 (1988). Under that method we credit Juanina and Miracle Strip with an integration score of 10,000, Da-Gon with 7300, and Pinnacle with 8687.50.[1] In awarding Pinnacle an integration credit of 8687.50, we recognize the proposal of Pinnacle's 15 percent owner, Wilma Seaver, to devote at least 30 hours per week to the station. As the Board found, the record reflects that Mrs. Seaver will be primarily responsible for supervising and managing the traffic and bookkeeping departments and will spend some time engaged in direct sales. 97 FCC 2d at 493-94 ¶ 17.

14. The Board is correct that bookkeeping, sales, and traffic activities are not themselves managerial. However, Mrs. Seaver will be responsible for *managing* and *supervising* other employees who will perform these activities. In this regard, the *1965 Policy Statement*, 1 FCC 2d at 395, specifies that "[w]e will accord particular weight to staff positions held by owners, such as general manager, station manager, program director, business manager, director of news, sports, or public service broadcasting, and sales manager." Nevertheless, it is a close question here. The record reflects that Wilma Seaver will devote at least 30 hours per week to the proposed station, and that she will be primarily responsible for supervising the traffic and bookkeeping departments and that she will also spend some time engaged in direct sales.

15. On balance, we find that Mrs. Seaver's proposed position supervising the traffic and bookkeeping departments is roughly analogous to that of a business manager, which is one of the positions deserving "particular weight" under the *1965 Policy Statement*. *Id.* We note further that "positions of less responsibility [than those specifically listed above] will be considered, [but that] they cannot be given the decisional significance attributed to integration of stockholders exercising policy functions." *Id.* Thus, we would give some credit to Wilma Seaver's supervisory position even if we concluded that she will exercise somewhat less responsibility than a full-fledged business manager.

16. If we fully credit Wilma Seaver's promise to be integrated 30 hours per week, Pinnacle would be entitled to 70 percent full-time and 30 percent substantial-time quantitative integration credit. For the reasons set forth below, we find that Miracle Strip and Juanina merit moderate integration preferences over Pinnacle because of the quantitative superiority of their integration proposals. Thus, our decision to award Pinnacle 15 percent quantitative integration credit for Wilma Seaver's clearly supervisory position does not affect the ultimate outcome of this proceeding.

17. The Board is correct that Miracle Strip and Juanina, both of which have integration values of 10,000, have a clear quantitative advantage over Pinnacle and Da-Gon (with integration values of 8687.50 and 7300) that cannot be overcome by the qualitative attributes of the integrated owners of Pinnacle and Da-Gon. 97 FCC 2d at 495 ¶ 20. Compare *Jerome Thomas Lamprecht*, 3 FCC Rcd 2527, 2527 ¶ 2 (1988) (quantitative superiority of 24 percent (or 2400 using new Index) is clear) with *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1474-75 ¶¶ 9-10 (1987) (no clear quantitative difference between an applicant with 90 percent full-time (9000 using Index) integration and applicant with 79.2 percent full-time and 19.8 percent full-

time 10 months of the year (9295 using Index) integration (a difference of 295 using Index)). *See* also *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 ¶ 35 (Rev. Bd. 1983) (subsequent history omitted) (a "clear" quantitative differential of 12.5 percent (1250 using Index) cannot be overcome by the qualitative attributes of the competing applicant's integrated owners).

18. Consistent with the cases cited above, where the difference between two applicants equals or exceeds 1250 under our new integration index, we will consider that a sufficiently clear quantitative difference that we will not look beyond that difference to consider qualitative enhancement factors. On the other hand, where the difference between competing applicants is less than 1250, we will proceed to consider qualitative factors in order to determine which applicant will better serve the public interest.

19. Here the difference between the integration scores of Juanina and Miracle Strip, both of which are 10,000 because of their 100 percent integration proposals, and those of Pinnacle and Da-Gon, which are 8687.5 and 7300, respectively, exceeds 1250. Thus, we will not consider the qualitative aspects of the integration proposals of Pinnacle and Da-Gon. In concluding that Pinnacle and Da-Gon are quantitatively inferior to Juanina and Miracle Strip, we recognize that all four applicants in this case will integrate an individual who has a controlling interest, or a combination of individuals who together have controlling interests, in their respective applications.[2]

20. We continue to believe that where there is a disparity of 1250 or more under our new integration index, the Commission can draw meaningful distinctions between competing integration proposals even though all applicants propose to integrate owners having a controlling interest in the application. In assessing competing integration proposals, we are ultimately concerned with the extent to which the integrated owners' responsibility is diluted by the interests of owners not proposing to be integrated full-time in the operation of the station. *See 1965 Policy Statement*, 1 FCC 2d at 395 ("[T]here is a likelihood of greater sensibility to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station.").

21. Equity interests held by non-controlling stockholders can constrain the discretion of the integrated owners, regardless of whether the integrated owners have the legal right to ignore the sentiments of the non-participating owners. In view of this circumstance, we continue to believe that, even where competing applicants propose more than 50 percent integration, the applicant proposing the greatest amount of quantitative integration is the comparatively superior applicant unless the disparity is so small as to be *de minimis*.

22. Moreover, we have already considered, and rejected, the question of whether the *qualitative* attributes of participating owners having less than a controlling ownership interest should have comparative significance only "as a tiebreaker in an otherwise deadlocked proceeding." *Horne Industries, Inc.*, 98 FCC 2d 601, 603-04 ¶ 5 (1984). In that case, the Board had held that "the general threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at a more-than-50% (or otherwise controlling) interest level . .. [and] a lower level of integrated minority ownership should be decisional [only] in otherwise deadlocked cases." 94 FCC 2d at 827 ¶ 13.

23. The Commission reversed the Review Board in *Horne* because it found that "minority owners with less than a controlling interest may nevertheless have an important voice in [the] station's affairs." *Id.* at 605 ¶ 6. Having recognized that owners with less than controlling ownership interest can play a significant role in policymaking at the station, we see no basis for disregarding *quantitative* differences of less than 50 percent. In other words, if an owner with a less than controlling interest can have a decisionally significant impact on the quality of an integration proposal, differences in the total amount of integration that do not exceed 50 percent are equally pertinent in assessing competing proposals. Accordingly, we conclude that under existing Commission precedent quantitative differences of less than 50 percent between competing integration proposals should continue to be considered.

24. Having found a clear quantitative difference in this case between the two applicants proposing 100 percent full-time integration and those proposing less than 100 percent full-time integration, we compare only the qualitative attributes of Miracle Strip's integrated owners with those of Juanina's integrated owners inasmuch as these applicants are quantitatively equal.[3] As the Board found, Juanina's integration proposal is qualitatively enhanced by the longtime local residence, civic participation, and limited broadcast experience of its 90 percent owner, John Matkowski. Juanina's integration proposal is also enhanced by 10 percent female ownership and 100 percent future local residence. In comparison, Miracle Strip's 100 percent integration proposal is enhanced by 75 percent female ownership and 100 percent future local residence.

25. Because female ownership has less significance than either minority ownership or local residence under the standard comparative issue, *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 ¶ 8, 947-48 ¶ 11 (1985), the long-term local residence of Juanina's 90 percent owner, John Matkowski, overcomes Miracle Strip's enhancement credit for the 75 percent female ownership of Lois Marks. Juanina's integration proposal is also enhanced by the 10 percent female ownership of Katherine Shea and by the limited broadcast experience of its 90 percent owner, John Matkowski. Under these circumstances, we conclude that Juanina is entitled to a slight integration preference over Miracle Strip and moderate integration preferences over both Pinnacle and Da-Gon.

26. Finally, Juanina's integration preference must be weighed against Pinnacle's slight preference for proposing auxiliary power. Under Commission precedent, auxiliary power "is intrinsically . . . less significan[t] than other aspects of the comparative analysis." *WVOC, Inc.*, 45 FCC 2d 420, 423-24 ¶ 7 (Rev. Bd. 1974), review denied, FCC 74-633 (June 19, 1974). Because Pinnacle's slight preference for auxiliary power does not overcome Juanina's moderate preference under the best-practicable-service criterion for integration, we find that the grant of Juanina's application will best serve the public interest.

27. ACCORDINGLY, IT IS ORDERED, That the application filed by Juanina, Inc. of Fort Walton Beach (File No. BPH-791114AD) IS GRANTED; and that the applications filed by Miracle Strip Communications, Inc.

(File No. BPH-790509AA), Pinnacle Broadcasting Corporation (File No. BPH-791115AB), and Da-Gon Broadcasting, Inc. (File No. BPH-791115AI) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The new formula for comparing competing integration proposals is: (100 x (hours per week/40))^2 x ownership interest. Applying this formula to the four applicants in this case, Miracle Strip and Juanina are entitled to *10,000* [that is, (100 x (40/40))^2 x 100%]; Da-Gon is entitled to *7300* [that is, (100 x (40/40))^2 x 73%]; and Pinnacle is entitled to a total of *8687.5*, including *7000* for the proposed participation of its two 35 percent owners, Mssrs. Seaver and Wesley [that is, (100 x (40/40))^2 x 70%)], *and an additional 1687.5* for the proposed participation of Pinnacle's two 15 percent owners, Wilma Seaver and Brenda Wesley [that is, (100 x (30/40))^2 x 30%].

[2] Da-Gon has argued at various stages of this proceeding that "[c]ontrol is control whether it be 100% or 51%," and that it is entitled to dispositive comparative credit because its 68 percent owner, Brenda Bandy, is a black female. According to Da-Gon, the fact that she has less than 100% control is of virtually no significance in terms of her ability to control the radio station and thereby enhance the diversification of the media in this country. Application for Review at 3. Inasmuch as Da-Gon did not raise this argument, or otherwise object to the award of only 73 percent *quantitative* integration credit in its exceptions to the initial decision, 97 FCC 2d at 494 ¶ 19, this argument is not properly before us and need not be considered on the merits. *See* 47 C.F.R. § 1.277(a), which specifies that "[a]ny objection not saved by exception . . . is waived." In any event, Congress has explicitly directed the Commission not "to repeal, to retroactively apply changes in, . . . its policies of . . . expand[ing] minority and female ownership of broadcasting licenses." *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes,* Pub. L. No. 100-459, 102 Stat. 2186, 221 (1988).

[3] Da-Gon would, on balance, rank behind Juanina and Miracle Strip even if we considered all three applicants to be *quantitatively* equal inasmuch as Da-Gon proposes no local residence. Under Commission precedent, minority ownership and local residence have equal weight in evaluating the *qualitative* aspects of competing integration proposals. *Radio Jonesboro, Inc.,* 100 FCC 2d 941, 945 ¶ 8 (1985). Pinnacle would also rank behind front-runner Juanina. Pinnacle offers more female ownership (30 percent versus 10 percent) and broadcast experience (70 percent "extensive" versus 90 percent "limited"). But Juanina is ahead on the more significant factor of past local residence and civic participation in the community of license. All of Pinnacle's integrated owners have lived in the service area and propose to move to Fort Walton Beach if their application is granted, but Juanina's 90 percent owner offers past local residence and civic participation in the community of license, which has more significance under the *1965 Policy Statement,* 1 FCC 2d at 396. Because local residence has more significance than female ownership, *Radio Jonesboro, Inc.,* 100 FCC 2d at 945 ¶ 8, 947-48 ¶ 11, and broadcast experience is deemed to have only minor significance, 1 FCC 2d at 396, Juanina's advantages for local residence and civic participation in the community of license outweigh Pinnacle's advantages on female ownership and broadcast experience.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BALTIMORE COUNTY, MARYLAND — File No. 603599

To Modify its License, KNIA 877, in the Public Safety Radio Service

Environmental Assessment of the Proposed Construction of a 600 Foot Tower at Arcadia, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1989; Released: June 26, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* involves an application and associated environmental assessment filed by Baltimore County, Maryland, (the County) to modify license KNIA 877 to construct an antenna tower at Arcadia, Maryland (the Arcadia site). A response to the County's environmental assessment was filed by Elizabeth W. Glascock (Glascock). We will grant the County's application, subject to certain conditions, as discussed below.

2. In sum, Glascock argues that the Private Radio Bureau (Bureau) must prepare an environmental impact statement because the tower at the Arcadia site will have a significant environmental impact on the historic district of Arcadia and on migratory birds and wintering Canada geese. Additionally, Glascock asserts that high intensity white lights used on the tower will have a significant environmental impact on the residential neighborhoods of Arcadia. After reviewing all relevant facts surrounding the proposed construction of the tower at the Arcadia site, we find, for the reasons set forth below, that the tower will have no significant environmental impact on the Arcadia historic district or on the migratory birds or wintering Canada geese. The high intensity white lights also will have no significant environmental impact. An environmental impact statement, therefore, is not required.

II. BACKGROUND

3. On March 23, 1984, the Bureau granted the County a license for an 800 MHz trunked land mobile radio system to provide countywide emergency communication services. Eight tower sites were approved for the system. On February 16, 1988, the County filed an application to modify its license to relocate one of the towers to the Arcadia site. Prior to the filing of the application, the Bureau had received a petition from Glascock requesting that the County be required to file an environmental assessment and an environmental impact statement on the Arcadia site.[1] Glascock's petition identified three environmental concerns: (1) The tower would adversely affect sites, buildings, and districts of historic significance that were listed, or eligible for listing, in the National Register of Historic Places (National Register);[2] (2) the tower would present a substantial hazard to migrating Canada geese flying over the Arcadia site; and (3) the tower's high intensity white lights would adversely affect Arcadia residences.[3] Although the County indicated on its application that the proposed tower would not have a significant environmental impact,[4] the Bureau determined that the tower might have a significant environmental impact, based on the information presented by Glascock, and required the County to prepare an environmental assessment of the proposal for the Arcadia site.[5]

4. On April 28, 1988, the County filed its environmental assessment as to the Arcadia site. First, the County contended that there was no need to assess the environmental effect of the tower's high intensity white lights because the tower would not be located in a residential neighborhood as defined by the local zoning law.[6] Nevertheless, the County stated that the Arcadia tower would employ a dual lighting system that would minimize the visibility of the lights at ground level. The County also asserted that the Arcadia site had no historic significance, that there were no historic structures present on the site, and, therefore, that there was no environmental impact on the tower site. Further, it stated that the historic structures in the vicinity of Arcadia were at distances away from the Arcadia site. Although the tower would have a visual impact upon these sites, the County indicated that the impact would be minimal because of the distance of the tower from these historic sites. Finally, the County stated that the threat to migrating Canada geese was minimal because the high-use flight path of the Canada geese was far away from the Arcadia site and a tower near the Arcadia site with similar lighting, but taller than the proposed Arcadia tower, had no record of Canada geese collisions.

5. In Glascock's Response to the Environmental Assessment (Response) filed May 16, 1988, Glascock contended that the County's assessment was deficient because the County (1) failed to obtain expert testimony to determine the existence of historic property in the Arcadia area and to analyze the tower's impact on such historic property; (2) failed to obtain expert testimony to determine the hazard the tower presents to migratory birds that may pass over the site and to the Canada geese that winter in the Arcadia area; and (3) failed to assess the impact of the high intensity white lights on the Arcadia residences. Glascock also attacked the failure of the County to obtain a special exception as required by the zoning regulation to construct the Arcadia tower. Glascock presented statements of a preservation consultant and a consultant specializing in bird collisions to support her contentions that Arcadia and the rural area surrounding it has historic significance, that the tower would have an adverse effect on this historic district, and that the tower would present a significant hazard to migratory birds passing over the site and to Canada geese wintering in the area.

6. On July 8, 1988, the County filed a Reply to the Response (Reply). The County again denied that Arcadia had any historic significance and reiterated that the visual impact of the tower on the distant historic sites would be

minimal. In summary, the County stated that the tower would not have a significant environmental impact on the area.

7. In assessing the environmental impact that the tower may have on the Arcadia area, under 47 C.F.R. § 1.1308, the Bureau must take into account, among other things,[7] the effect the tower might have on historic sites listed or eligible for listing in the National Register.[8] The Bureau requested that an official of the Maryland Historic Trust (Trust)[9] identify any historic sites in the vicinity of Arcadia and, if any historic sites were present, advise the Bureau as to the effect, if any, the tower would have on them. The Trust found that the town of Arcadia had historic significance and would be eligible for listing in the National Register as a historic district.[10] The Trust also found that the proposed tower would have an adverse effect on the historic district.[11] The County agreed with the Trust's determination[12] and proposed measures to mitigate the adverse effect.[13] The Trust found the measures acceptable and found that the measures would mitigate the adverse effect of the tower on the historic district.[14] The Bureau concurred with the Trust's determination and submitted copies of all the pleadings and correspondence to the Advisory Council for Historic Preservation (Advisory Council) for its comments. The Advisory Council concurred with the Trust's and the Bureau's determination and the mitigation measures. The Advisory Council, however, requested that the Bureau address the issue of alternative sites prior to approving the County's application.

8. On January 6, 1989, pursuant to the request of the Bureau, the County provided an analysis of alternative sites it considered and the reasons the Arcadia site was chosen. The County selected four sites representative of sites available in the four directions from the Arcadia site. It analyzed each site's feasibility based on the County's technical requirements for its system, the cost considerations, and possible effects on historic properties in the vicinity of each alternate site. In summary, the County states that the alternative sites would not meet the technical requirements necessary for the countywide system, are not economically feasible, and two of the sites would have effects on historic properties similar to the effects of the Arcadia tower on Arcadia.

9. On January 25, 1989, Glascock filed a Response to the Alternative Site Analysis. Glascock contends that the County did not present sufficient information to allow the Bureau to determine the feasibility of the alternative sites. Further, Glascock argues that the Bureau must prepare an environmental impact statement because the County failed to analyze the tower's impact upon historic sites, failed to present technical reasons why alternative sites are not available, failed to comply with the Preservation Act, and failed to comply with the local zoning regulations.

III. DISCUSSION

A. Zoning Approval

10. Each of the environmental concerns is discussed separately below. As to the County's alleged failure to comply with the Baltimore County Zoning Regulations, both the County and Glascock agree that the Arcadia site has an R.C.2 zoning classification[15] under the Baltimore County Zoning Regulations.[16] In the environmental area, the Commission takes into account local zoning decisions where the local authorities considered environmental effects.[17] Otherwise, zoning decisions are relevant insofar as they relate to a reasonable assurance of site availability.[18] Here, the local zoning authorities held that the County need not comply with the zoning regulations and approved construction of the proposed tower at Arcadia.[19] The County Board of Appeals of Baltimore County (Board of Appeals) also considered the environmental concerns of Glascock in rendering its opinions but found that the public's health, safety and welfare in obtaining emergency service far outweighed any environmental concerns. The County has provided sufficient evidence of local zoning board decisions approving construction of the tower at the Arcadia site as required by our Rules.[20]

B. Historic Properties

11. Contrary to Glascock's assertions, we have received sufficient information to identify the environmental concerns relating to the impact the tower will have on the Arcadia historic district. In addition to the environmental assessment, the Commission may request further information from the applicant, interested persons, and agencies and authorities that have jurisdiction by law or relevant expertise.[21] We have received information from the Trust, with which the County has concurred,[22] as well as from Glascock, which we believe is sufficient to support our determination.

12. The proposed tower site is adjacent to the town of Arcadia. Arcadia is "locally significant for its association with the growth of small centralized communities in rural Baltimore County as a result of development of rail transportation in the area into the late 19th Century."[23] As such, the town of Arcadia is eligible for listing in the National Register. In addition, there are four sites potentially eligible for listing in the National Register near the town of Arcadia, south/southeast of the tower site.[24] The construction of the tower will not result in the destruction of any historic buildings or structures. The tower will introduce a visual element that is out of character with the town of Arcadia. It will not, however, increase traffic, population, noise pollution, air pollution or cause other similar physical changes to the environment. The question, therefore, is whether this visual impact is so great as to warrant the preparation of an environmental impact statement.

13. Because of the historic significance of the town of Arcadia, we must consider the requirements of the Preservation Act as well as the National Environmental Protection Act of 1969, as amended (NEPA).[25] Although compliance with the Preservation Act does not relieve us of compliance with NEPA, it is relevant to our determination of the impact of the tower on the historic environment.[26] The Preservation Act requires us to consider the tower's effect on historic properties and to afford the Advisory Council a chance to comment on the tower's construction. We agree with the Trust that the town of Arcadia is historic, that the tower as originally proposed would have an adverse effect, and that the measures agreed to by the County successfully mitigate the adverse effect. The Advisory Council has been afforded an opportunity to comment and has done so. A Memorandum of Agreement has been drafted expressing agreement by the Advisory Council, the Trust, the County, and this Bureau that historic preservation concerns have been

identified and satisfied. Thus, we find that the requirements of the Preservation Act and its implementing regulations have been met.

14. If a significant effect were to exist, it would be more likely to exist on the immediate site and land adjacent to it. *See Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313, 1324 (1974). The proposed site has no historic significance nor are there any structures of historic significance that would be destroyed in order to construct the tower. The site is, however, adjacent to the town of Arcadia, which has been found to have significance as a historic district. The local zoning and planning boards and, in this case, the state historic agency can more readily ascertain the impact of the tower on the area because of their familiarity with the area. *See Amendment to the Environmental Rules*, 60 RR 2d 13, 17-18 (1986). The aesthetic and historic preservation concerns of Glascock are more appropriately resolved by these agencies. Although we are not delegating our responsibilities to determine the impact of the tower on the environment, we will take into consideration these agencies' approval of the construction of the tower. The Board of Appeals approved construction of the tower because of the significant public benefit. The Trust, although finding the tower as originally proposed would have an adverse effect on the historic district, found the adverse effect to be mitigated by the County's amended proposal to use the dual lighting system and to landscape the perimeter of the tower's base. The landscape plan minimizes the visual impact of the lower portion of the tower on adjacent sites.

15. Glascock argues that the County's proposed mitigation measures are insufficient because the only acceptable mitigation is removal of the tower to an alternative site. She states that the tower could be moved 5 to 7 miles from the Arcadia site without reducing the effectiveness of the system. We have reviewed the County's assessment of alternative sites as well as its reasons for selecting the Arcadia site. The purpose of the tower is to provide, with the other seven towers located throughout the County, countywide coverage for the County's emergency services to ensure the safety, health and welfare of each County resident. Consequently, it is in the public interest to have the best possible coverage to all sites within Baltimore County. All the alternative sites presented do not afford adequate coverage, and in fact, two of the sites present similar historic preservation concerns as presented by a tower at the Arcadia site.

16. The coverage surveys prepared by the County's system designer indicate that the selected alternative sites do not provide the necessary coverage (in conjunction with the other tower sites within the system) to all the essential portions of Baltimore County as does the Arcadia site. Glascock disputes the unavailability of alternative sites but presents no technical information to indicate that the County's coverage surveys are incorrect nor suggests an alternative site that would meet the needs of the County's system. Glascock argues that the County has not satisfied our requirement to consider alternative sites because it has failed to analyze every square foot of the area within a range of five to seven miles of Arcadia (taking into consideration every possible combination of tower height, transmitter power, and antenna radiation pattern) and to present the entire study to the Bureau. We find that neither the Preservation Act nor its implementing regulation, NEPA nor its implementing regulations, nor our regulations require such an analysis. The study of alternatives need not be exhaustive or exacting, only a reasonable choice of alternatives is required.[27]

17. As mentioned previously, two of the alternative sites are close to designated historic districts. Glascock's preservation consultant disputes the conclusion of similarity of effect based merely on the proximity of the tower to the historic districts. We note, however, that the Coopersville site is close to the proposed WGRX tower that was denied a special exception because of its effect on the Worthington historic district.[28] Furthermore, the mansion and private chapel of the Montrose School were nominated for inclusion in the National Register (the nomination was not accepted by the Trust only because of inadequate paperwork).[29] In any event, the tower would still have a visual impact on these areas just as it would in Arcadia.

18. We agree with Glascock's contention that the cost comparison of buying land on which to construct the tower as compared to leasing the land is not complete. This lack of specific cost information, however, does not outweigh our concern of adequate system coverage. We find that the alternative sites will not adequately provide the coverage required for the County's public safety system. The coverage characteristics of the system are of critical importance and reducing the coverage is not in the public interest. Moreover, the measures proposed by the County will substantially mitigate the visual impact on the surrounding area. Consequently, we find that the selection of an alternative site is not required.

19. The license will be conditioned on the use of the dual lighting system and landscaping the perimeter of the tower's base. Accordingly, we find no significant impact on the environment on the basis of the tower's effect on historic properties.

20. We further find no basis for Glascock's contention that the County's failure to hire a professional consultant requires preparation of an environmental impact statement. While consultants often may be helpful, federal environmental laws and implementing regulations nowhere require the hiring of professional consultants.

C. High Intensity White Lights

21. Generally, no environmental assessment need be provided when a tower is equipped with high intensity white lights unless it is located in a residential neighborhood. A residential neighborhood must be so designated by the local zoning laws. In this case, the tower site and surrounding area is classified as R.C.2, an agricultural classification. Although residences are a permitted use, they are not the preferred use. Accordingly, we agree with the County that the tower is not within a residential neighborhood.

22. In any case, contrary to Glascock's allegations, the County has provided an analysis of the impact of the tower's lighting on persons residing in the areas surrounding the tower site. The County intends to use a dual lighting system. High intensity white lights will be employed during daylight hours when they are less visible and less apt to disrupt the serenity of the residents. Additionally, shielding of the high intensity white lights will be provided by louvers. The use of such louvers will further reduce the visibility of the light to residents below. After daylight hours, a red beacon will be used, further reducing the amount of light visible to the sur-

rounding households. Although light from the tower may not be completely eliminated, the County's lighting system will minimize the impact on persons living in the tower area. Accordingly, we find that the tower's high intensity white lights will have no significant impact on the environment.

D. Migratory Birds and Canada Geese

23. As a general proposition, we agree that tall, lighted towers do contribute to bird mortalities. Glascock alleges that the proposed tower will significantly endanger migratory birds and Canada geese. The County assessed the potential hazard of its proposed tower to be minimal based, among other things, on information from an operating tower near its proposed site. Glascock, on the other hand, submitted a report of Richard Plunkett, a consultant on bird collisions.

24. The County assessed the environmental impact of the tower to be minimal as it relates to bird mortalities. The County, in making its assessment, relies on the experience of a constructed communications tower (WGRX) near its proposed site. This tower uses similar lighting and is of similar height to the County's proposed tower. The tower's personnel reported no bird kills during the three years that the tower has been in operation. The County asserts that the lack of bird mortalities caused by the operational tower indicates that a high use flight path of migratory birds is not located over the proposed site and that any potential hazard to birds posed by its proposed tower would be minimal.

25. Mr. Plunkett disputes the County's assessment based on the existence of literature relating to bird mortalities caused by tall, lighted towers. He rates the potential hazard the proposed tower would pose to birds as significant,[30] but he presents no current, credible data relating specifically to the Arcadia area to establish the existence of high-use flight paths over the proposed site or to establish the number of birds that might be placed at risk. Moreover, we do not find the Baltimore City data relevant.[31] We, however, do find persuasive the experience of the WGRX tower, in assessing the potential hazard, if any, posed by the proposed tower. Accordingly, we find that the construction of the tower will not have a significant effect on the environment caused by bird mortality.

IV. CONCLUSION

26. IT IS THEREFORE ORDERED that the application for modification of the County's license be GRANTED without further environmental considerations.

27. IT IS FURTHER ORDERED that the County provide the community notice of our finding of no significant impact on the environment by construction of the tower at its Arcadia site as required by Section 1.1308(d) of our Rules.[32]

28. IT IS FURTHER ORDERED that the license granted the County for a tower at the Arcadia site will be conditioned on the use of a dual lighting system and require landscaping around the perimeter of the tower site as agreed to by the County, the Trust, and the Advisory Council.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] The Petition was filed on October 16, 1987, in objection to the County's request to waive Section 90.629 of our Rules, 47 C.F.R. § 90.629, to extend the time to construct its licensed system. The Chief of the Bureau's Land Mobile Branch at Gettysburg, Pennsylvania, denied the Petition because there was no application for the Arcadia site pending before the Bureau. 47 C.F.R. § 1.1313. *See* Letter from Terry Fishel, Chief, Land Mobile Branch, Private Radio Bureau, Federal Communications Commission (FCC) to John C. Murphy, Glascock's attorney, October 23, 1987. On November 9, 1987, Glascock filed an Application for Review of Action Taken Pursuant to Delegated Authority. The Application was denied as moot because the County was required to file an environmental assessment on the Arcadia site. *See* Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, FCC, to John C. Murphy, June 17, 1988.

[2] *See* 47 C.F.R. § 1.1307(a)(3).

[3] *See* 47 C.F.R. § 1.1307(a)(6).

[4] Item 34 of FCC Form 574 must be checked "yes" if the proposed communication facility might have a significant environmental impact. F.C.C. Form 574 Instructions, 23 (July 1987). The County checked "no" on its application for Item 34.

[5] An interested person may raise environmental concerns in a written petition to the Bureau responsible for processing an application for a communication facility. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an environmental assessment. 47 C.F.R. § 1.1307(c).

[6] The zoning classification of the site is agricultural. Residences are a permitted use; however, they are not the preferred use. *See* Environmental Assessment, p. 2 and Exhibit A.

[7] *See* 47 C.F.R. § 1.1307(a)(4).

[8] Every federal agency with jurisdiction over a federally licensed undertaking must take into account the effects of the undertaking on nearby properties included in, or eligible for, the National Register prior to issuing the license. National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470(f). The agency, with the assistance of a State Historic Preservation Officer (SHPO), must identify any historic properties that would be affected, determine if the effect would be adverse or not, and, if the effect is adverse, amend the proposed undertaking, if possible, to avoid or reduce the adverse effect. *See* 36 C.F.R. Part 800, Subpart B. Once the agency and the SHPO are in agreement that all historic properties have been identified and preservation concerns satisfied, the documentation is submitted to the Advisory Council on Historic Preservation for review and comment. *Id.* at § 800.6. A Memorandum of Agreement, if an adverse effect is determined and mitigation measures are found to be available to reduce or avoid such effect, documents the terms with which the agency must abide if the undertaking is licensed. *Id.* at §§ 800.5, 800.6(c)(1). The finalization of such a Memorandum of Agreement concludes the process mandated by the Preservation Act. *Id.* at § 800.6(c)(1). The Memorandum of Agreement may then be considered in making a decision with respect to the particular undertaking.

[9] The designated State Historic Preservation Agency in Maryland.

[10] Letter from J. Rodney Little, Director, Maryland Historical Trust, to Terry Fishel, FCC, June 14, 1988.

[11] *Id.*

[12] Letter from Joseph A. Godles, attorney for the County, to Terry Fishel, FCC, September 9, 1988.

[13] *Id.*; Letter from Joseph A. Godles, attorney for the County, to Terry Fishel, FCC, September 30, 1988.

[14] Letter from J. Rodney Little, Director, Maryland Historical Trust, to Terry Fishel, FCC, October 5, 1988.

[15] *See supra* note 6.

[16] The regulations provide that a wireless transmitting or receiving facility may be permitted by special exception in an R.C.2 zone and that an environmental impact statement must be submitted to the zoning board.

[17] *See* Amendment to the Environmental Rules, 60 RR 2d 13, 17-18 (1986).

[18] *See* 47 C.F.R. § 1.1311(c).

[19] Petition for Special Hearing NW/S Trenton Road, Opposite Old Quaker Road; also, NE/end Carnival Road; N of Arcadia Avenue, Deputy Zoning Commissioner of Baltimore County, No. 88-182-SPH (January 21, 1988), *aff'd,* In the Matter of the Application of Elizabeth W. Glascock for Special Hearing, County Board of Appeals of Baltimore County, No. 88-182-SPH (May 20, 1988), aff'd, Glascock v. Baltimore County, Circuit Court for Baltimore County, Case No. 88-CG-2712 (Memorandum Opinion, February 2, 1989).

[20] 47 C.F.R. § 1.1311(a)(2) and (c).

[21] 47 C.F.R. § 1.1308(b). *See also* Golden State Broadcasting Corp., 71 FCC 2d 1284, 1288 (1979).

[22] Letter from Joseph A. Godles, attorney for the County, to Terry Fishel, FCC, September 9, 1988.

[23] Letter from J. Rodney Little, Director, Maryland Historical Trust, to Terry Fishel, FCC, June 14, 1988.

[24] *Id.*

[25] 42 U.S.C. §§ 4321-4335.

[26] *See* 47 C.F.R. § 1.1308(c), as amended, effective September 26, 1988. *See also* Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).

[27] *See* 47 C.F.R. § 1.1311(a)(4). *See also* Druid Hills Civic Association v. Federal Highway Administration, 772 F.2d 700 (11th Cir. 1985); City of New Haven v. Chandler, 446 F.Supp 925, 933-934 (D.Conn. 1978).

[28] *See* Glascock's Response to the Environmental Assessment, Exhibit E.

[29] Letter from John McGrain, Executive Secretary, Landmarks Preservation Commission of Baltimore County, to Colonel Phillip G. Huber, Chairman, Baltimore County 800 MHz Committee, September 7, 1988.

[30] Mr. Plunkett relies on annotations from *Avian Mortality at Man-Made Structures: An Annotated Bibliography (Revised)* to substantiate his assertion that communication towers cause bird mortalities. Specifically, he refers to eight annotations that have references to bird kills in Baltimore City to support his assertion that the proposed tower would have a significant environmental effect. The eight annotations, however, discuss only four different incidents: A bird kill in 1948 in Baltimore City, seven bird kills during a three year period from 1964-1966 in Baltimore City, 20 bird kills during a four-night period throughout the eastern United States with one of the twenty incidents in Baltimore City in 1970, and a report of a bird kill during a two-night period in 1973 in Baltimore City.

[31] We do not find the Baltimore City data relevant because: (1) Baltimore City is some 20 miles southeast of the Arcadia site. Birds that overfly Baltimore City will not necessarily overfly the Arcadia area. (2) Baltimore City is located contiguous to the Chesapeake Bay, whereas Arcadia is inland. (3) The references to the height of the Baltimore City towers tend to indicate that there is a significant height difference between these towers and the proposed tower at the Arcadia site. (4) The lighting used by the Baltimore City towers at the time of the reported bird kills is not indicated. According to Mr. Plunkett, the lighting of a tower is an important factor in assessing the extent of a hazard posed by a tall tower. The use of intermittent, flashing sources of lights, such as will be used by the County on its tower, is superior in reducing the likelihood of bird collisions as compared to a constant, fixed source of light.

[32] 47 C.F.R. § 1.1308(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-196

In the Matter of

Amendment of Section 73.202(b), RM-5492
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Louisiana)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 9, 1989; Released: June 26, 1989

By the Commission:

INTRODUCTION

1. Before the Commission is an Application for Review, filed by C.R. Crisler ("Crisler"), of a *Memorandum Opinion and Order*, 3 FCC Rcd 4614 (Mass Media Bur. 1988)("*Memorandum*").[1] Also before the Commission in this proceeding are a motion for extension of time to file an opposition and an opposition to Crisler's application for review, filed by Lafayette Joint Venture ("Lafayette FM"), and Crisler's motion for extension of time to file a reply and his reply.[2]

BACKGROUND

2. Crisler requests that we review the Bureau's actions denying his request that higher class Channel 238C2 be substituted for Channel 238A at Lafayette, Louisiana. Crisler's application for review argues that the Bureau has refused to enforce existing policy, ignored or violated precedent, and improperly created new policy.

3. Channel 238A was allotted to Lafayette pursuant to the *First Report and Order* in MM Docket 84-231, 50 Fed. Reg. 3514 (January 25, 1985). Eighteen applications, including one by Crisler Communications, in which Crisler is a partner, were filed during the filing period for Channel 238A, which opened on April 7, 1986, and closed on May 7, 1986. Crisler filed his Petition for Rule Making requesting the substitution of Channel 238C2 approximately one month later, on June 10, 1986. The applications were designated for hearing on October 23, 1987.[3]

4. In response to Crisler's Petition, but prior to designation for hearing, the Bureau issued a *Notice of Proposed Rule Making*, 2 FCC Rcd 3567 (released June 16, 1987)("*NPRM*"), which stated that Crisler's proposal had merit because it furthered the policy of the Commission to allot the highest class of channel available to a community for which an interest is expressed. In support, the *NPRM* referenced our *First Report and Order* in MM Docket 84-231, cited *supra*. However, neither the *First Report and Order* nor the NPRM stated that the policy of generally favoring a higher class channel allotment was the sole policy consideration. The *NPRM* stated a change in the allotment to a higher class channel might require applicants to specify different transmitter sites than those specified in existing applications, and, accordingly, invited the applicants to comment. The *NPRM* also noted that, since the higher class channel was being made available in Lafayette for the first time, the Commission would set a new window period for filing applications if the allotment were made. However, the *NPRM* did not state that the allotment definitely would be made.

5. In comments responding to the NPRM, four applicants, 80-90 Limited ("80-90"), FM Lafayette Limited Partnership ("Lafayette FM"), Royal Broadcasting Limited Partnership ("Royal"), and James A. Linzer and Margo Linzer d/b/a Linzer Enterprises ("Linzer"), supported Crisler's petition to upgrade Channel 238A to a Class C2 Channel, but they opposed the opening of a new window. 80-90 asserted that since the filing window had closed before Crisler filed his petition, there was no public interest reason not to treat the upgrade of Channel 238A in the same manner as a modification of an FM license to a higher co-channel allotment pursuant to Section 1.420(g) of the Commission's Rules.[4] 80-90 stated that pursuant to that Section, an eventual permittee would not be required to compete with other applicants for the upgrade. The other parties also opposed any action that would require the opening of a new window. Linzer stated that the policy of upgrading a channel to the highest class for which interest is expressed should not be implemented when it complicates and delays an ongoing proceeding and delays the introduction of new broadcast services. Royal stated that opening a new window would impose on the applicants the burden of amending their applications and would lead to waste of the Commission's resources by permitting a tardy applicant to seek an upgrade in a new community or on a better channel, thereby requiring the Commission to start a new hearing. Lafayette FM also opposed opening a new window on the proposed upgrade.

6. Crisler filed reply comments in which he agreed with the positions taken by Royal, Lafayette FM, 80-90 and Linzer. On August 20, 1987, when Crisler filed his reply comments supporting the commenters' request that Channel 238A be upgraded without a new window, Crisler was an applicant in good standing in MM Docket 87-449.[5] Therefore, if the Bureau had decided to upgrade that channel without opening a window, Crisler would have benefited directly because he would automatically have become an applicant for the upgraded channel. However, after the applications for Channel 238A were designated for hearing on October 23, 1987, Crisler did not submit the required hearing fee. Instead, on November 10, 1987, Crisler filed a notice of appearance and request for waiver of the fee, contending that the reopening of the window for the Lafayette allotment would render superfluous the hearing fee. Crisler's application was subsequently dismissed by the Administrative Law Judge in Docket 87-449. *See Order*, FCC 87M-3216 (released December 10, 1987).[6] Crisler did not timely appeal that ruling.[7]

7. The Bureau's *Report and Order*, 2 FCC Rcd 7303 (1987), denied Crisler's petition. The Bureau stated that allotment of a higher class channel would require the opening of a new application filing window. However, the Bureau added the qualification that it had not intended to proceed with such a new window over the objections of the existing applicants for the Class A Channel which

would be upgraded as a result of the new higher class channel allotment.[8] The Bureau also determined that, as a matter of policy, it would not open a new filing window when the applications on file had been processed and designated for hearing. The Bureau reasoned that its staff would be overly burdened by reprocessing a new set of applications on the new allotment and that a significant and unacceptable delay in the provision of new service would result. The Bureau concluded by noting that the eventual permittee of Channel 238A may refile for an upgrade to Channel 238C2 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.[9]

8. Crisler petitioned for reconsideration of the *Report and Order*. First, he asserted that no applicants for Channel 238A had objected to the upgrade. Second, he opposed the Bureau's determination that opening the window and reprocessing the existing applications, and processing new applications, would be inefficient. Crisler argued that, because the Commission held his upgrade petition for a year without acting on it, and because it waited to propose the upgrade until after the designation for hearing of the applications for Channel 238A,[10] the burden of processing existing and new applications was caused by the Commission's own inaction. Third, he contended that the Bureau's refusal to upgrade Channel 238A violated the precedent established in *BellaVista, Arkansas*, 2 FCC Rcd 7415 (1987). Crisler argued that *Bella Vista* reinforced the policy, set forth in MM Docket 84-231, cited *supra*, of alloting the highest class of channel to a community for which an interest is expressed. Crisler submitted that the Bureau's alleged departure from *Bella Vista* violated the requirement allegedly established in *Helena, Montana*, 50 RR 2d 70 (1981), *i.e.* that the Commission cannnot change precedent without first holding a rule making proceeding. Crisler argued that because of the Bureau's alleged departure from *Bella Vista*, the interests of the community of Lafayette and of the public have been harmed by depriving Lafayette of a third, and possibly a fourth, wide area FM service. Crisler asserted that the *Report and Order* established an anti-upgrade precedent which overrules Commission policy stated in MM Docket 84-231 and contravenes the requirements of Section 307(b) of the Communications Act of 1934, as amended.

9. In its *Memorandum Opinion and Order*, the Bureau rejected Crisler's arguments. It noted that *Bella Vista* was decided after issuance of the *Report and Order* in this proceeding, but stated that even if *Bella Vista* had predated the *Report and Order*, it would have been inapposite. The Bureau observed that the *Bella Vista* proceeding did not involve the upgrade of a channel for which applications were pending, and consequently did not involve the objections of applicants to the opening of a new filing window, or involve the administrative burden of simultaneously reprocessing existing applications and processing new applications. The Bureau added that the opening of a new filing window over the objections of the applicants would unjustifiably prejudice the existing applicants because of the significant additional costs they would bear in filing during the new window.

10. The Bureau also rejected Crisler's argument that the *Report and Order* overruled Commission policies favoring upgrades and hence would preclude parties in the future from seeking upgrades. It found that the *Report and Order* did not formulate and address any issues relevant to possible modification of general FCC policies favoring upgrades, and rejected Crisler's assertion that Section 307(b) of the Communications Act compels a different result.

THE PLEADINGS

11. Crisler's Application for Review argues that the Bureau, by not substituting the higher class channel and reopening the filing window in this case, failed to apply Commission policy in effect when the rule making request was filed. Crisler argues that the existence of such a policy was confirmed through discussions with staff on several occasions, and that he relied on those discussions to his detriment.[11] Crisler's Application for Review does not mention or discuss the Bureau's discussion in the *Memorandum Opinion and Order* of the arguments which Crisler submitted in his petition for reconsideration concerning the *Bella Vista, Arkansas* and *Helena, Montana* decisions, cited *supra*. Crisler further argues that the Communications Act of 1934 requires allotment of a higher class channel because such an allotment represents a more advantageous distribution of broadcast facilities, but does not cite a specific section of the Act. Crisler argues that the Commission has never before utilized the considerations of administrative efficiency utilized by the staff to deny an "otherwise unopposed" petition for rule making. Crisler argues that the Bureau, by refusing to follow both Commission policy mandating the upgrade and the mandate of Section 307(b) of the Communications Act, has changed policy retrospectively in violation of due process.

12. Finally, Crisler requests that if the Commission decides to upgrade the channel and open a new filing window on the upgrade, it should either permit any party to apply, or, alternatively, limit eligibility to those original applicants who remain interested in applying. Crisler states that fairness requires that, at very least, the latter group be allowed to apply since they too were allegedly informed by the Commission staff that the channel would be upgraded and a new window opened.

13. In its opposition, Lafayette FM contends that Crisler is mistaken in his belief that the Bureau, by refusing to upgrade Channel 238A and to open a new window on the upgrade, has permanently deprived Lafayette of a higher class allotment. Lafayette FM cites the Bureau's statement in the *Report and Order* that Channel 238C2 could be substituted for Channel 238A if the permittee obtains a co-channel upgrade pursuant to Section 1.420(g). Lafayette FM states that, pursuant to a settlement agreement, it has obtained the construction permit for Channel 238A and intends to seek an upgrade to Channel 238C2, pursuant to Section 1.420(g), as soon as its Class A authorization is final. It contends that, as permittee, it is the only party eligible to request an upgrade of Channel 238A at Lafayette.

14. Lafayette FM submits that, if the Bureau had upgraded Channel 238A after designation for hearing, it would have placed an unwarranted burden on the Commission's resources, disrupted the comparative hearing, and further delayed commencement of new service at Lafayette. It argues that because the Bureau's decision expedites new service and avoids unwarranted administrative inefficiencies, it is impossible to accept Crisler's contention that Commission policy and federal law have been violated. Lafayette FM adds that Crisler has failed to cite a single case in which the Commission has reopened an application filing window either after the affected applica-

tions have been processed and designated for comparative hearing or after a permit has been awarded in a comparative hearing.

15. Lafayette FM also argues that Crisler should be estopped from advancing in his application for review the argument that a new application filing window should be set for applicants for the upgraded channel. It cites that part of Crisler's reply comment in which he adopted the opposite position. Lafayette FM explains that Crisler was content to support a "windowless" upgrade when his application for Channel 238A was pending, but now seeks, since his application was dismissed, a new application filing window. Lafayette concludes that Crisler has abused the Commission's processes by maintaining inconsistent positions.

DISCUSSION

16. Crisler's application for review is premised on the mistaken belief that existing Commission policy requires substitution of a higher class channel even when applications are pending for the lower class channel. The Commission, however, has never previously addressed this question. While the Commission did, in Docket No. 84-231,[12] express a general preference in favor of higher class allotments, it did not address in that proceeding how that policy would apply when applications are pending. Similarly, the decision by the Chief, Allocations Branch, in *Bella Vista, Arkansas* did not involve pending applications.

17. We conclude that, under the circumstances of this case, the Bureau properly decided not to upgrade the Lafayette allotment. In light of the pending applications, an upgrade here would impose a significant burden on the existing applicants and would complicate the processing of the pending applications by the staff, thereby delaying the provision of new service to Lafayette. If the allotment were to be upgraded, the applicants would necessarily be required to amend their applications to specify the higher class channel. Because the amendments might involve significant changes in the applicant's technical proposals, a number of issues relating to the basic qualifications of the applicants could arise. In addition to issues specifically related to the technical proposals, such as site availability, air hazards, and environmental impact, a significant change in an applicant's technical proposal could call into question its financial qualifications or raise concerns under our multiple ownership rules. Therefore, because the class of a channel is a critical factor affecting a variety of technical and other aspects of applications, we believe that upgrades requested while applications are pending should not be allowed. In our view, the interests of the applicants, the Commission and the public in expediting new service to a community without further cost and delay outweigh the potential benefits of the immediate allotment of a higher class channel.[13]

18. As we conclude that the Bureau properly declined to upgrade an allotment when applications are pending, we need not reach the separate question raised by Crisler of whether a new application filing window must be opened if an allotment for which applications are pending is upgraded. We note, however, that Crisler himself originally supported an upgrade without a window being opened for new applications for Lafayette, and only changed his mind and adopted a new position after his application was dismissed and thus his original position no longer served his interests.

19. Accordingly, IT IS ORDERED, That the Motion For Extension of Time to File An Opposition filed by Lafayette Joint Venture on September 23, 1988, IS GRANTED.

20. And, IT IS FURTHER ORDERED, That the Motion For Extension Of Time to File A Reply filed by C.R. Crisler on November 12, 1988, IS DENIED.

21. And, IT IS FURTHER ORDERED, That the Application for Review filed by C.R. Crisler on August 29, 1988, IS DENIED.

22. And, IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Crisler's Application for Review violated two sections of the Commission's Rules. First, it violated Section 1.115(f) of those Rules, in that it was not served on the parties to the proceeding on or before the date of filing, August 29, 1988. *See* 47 CFR 1.47(b). Crisler's statement of service indicated service on only one unnamed party. Crisler's violation of Section 1.115(f) might provide sufficient independent grounds for our action denying his Application for Review, in view of the disruption and delay caused by the violation. Second, because the Application for Review was not served on any party, it violated the prohibition in Section 1.1202(b)(1) of the Rules against ex parte presentations. However, on September 15, 1988, Crisler effected service on the parties. Lafayette acknowledged receipt of service on September 16, 1988. Moreover, there is no evidence that Crisler intended to violate the Rules, or of actual prejudice to any party, and no party opposed the filing of his Application for Review on the basis of either violation. For these reasons, and because we wish to remove uncertainty concerning the substantive points raised by Crisler, we will, as a discretionary matter, consider Crisler's Application for Review. We note, however, that consideration of Crisler's Application for Review despite the violations does not alter the outcome of this proceeding. In view of the fact that the Application for Review was untimely served, we will also grant Lafayette FM's request for an extension of time to file an opposition to Crisler's Application for Review.

[2] Crisler filed a motion for extension of time on October 12, 1988, requesting an extension until November 13, 1988 to file a reply to Lafayette FM's opposition. We will deny that motion and will not consider the reply for two reasons. First, Section 1.46(b) of our Rules requires that motions for extension of time be filed seven days before the filing date, or, in this case, by October 11, 1988. Therefore Crisler's motion filed on October 12 was late. Although we will consider late-filed motions for a brief extension of time upon a showing of emergency circumstances, Crisler made no such showing. In addition, Crisler failed to orally notify and serve other parties as required by Section 1.46(c) of our Rules. Second, Section 1.115(d) of our Rules requires that a reply be filed within ten days after the

filing of the opposition. In this case, the opposition was filed on October 3, 1988. Pursuant to the provisions of Sections 1.4(b) and 1.4(f) pertaining to filing of pleadings with the Commission by mail, Crisler's reply was due on October 18, 1988. Crisler's Reply was not received until November 16, 1988.

[3] *See Hearing Designation Order* in MM Docket No. 87-449, FCC 87M-2682 (released October 23,1987).

[4] *See FM Upgrades*, 60 RR 2d 114 (1986), for the Commission's current policies governing upgrades undertaken pursuant to Section 1.420(g) and the reasons for those policies.

[5] In his reply comments, Crisler also proposed that, if the Bureau rejected his proposal to substitute Channel 238C2 for Channel 238A, it should allot, as an alternative, Channel 299C2 at Lafayette to accommodate the commenters' expressions of interest in a Class C2 channel. That proposal was subsequently withdrawn by Crisler.

[6] Section 1.1115(c)(1) of the Commission's Rules requires an applicant seeking a waiver of a filing fee to submit the filing fee with its waiver request. 47 CFR § 1.1115(c)(1). Crisler failed to submit the required fee with his waiver request.

[7] The Managing Director denied Crisler's waiver request by letter dated December 23, 1987. Crisler filed a letter concerning that action on February 9, 1988, to which the Managing Director responded by letter dated May 17, 1988. Crisler then filed, on June 9, 1988, a pleading styled a petition for reconsideration, and bearing the Caption MM Docket 87-449.

[8] In the *Report and Order*, the Bureau did not specifically state the basis for its decision not to proceed with a new filing window over the objections of the applicants. However, as the comments of the applicants make clear, their objections were based on the fact that the opening of a new window would burden the existing applicants by requiring them to amend various specifications in their applications, would complicate and delay the ongoing comparative hearing proceeding, and would thereby delay provision of new service.

[9] *See Report and Order*, 2 FCC Rcd 7303, 7304 (1987). *See also* Section 1.420(g) of the Commission's Rules. 47 CFR § 1.420(g). That Section allows the Commission to modify a permit or license for an FM station to specify operation on another class or channel. In this case, a modification of the permit for Channel 238A to specify operation on Channel 238C2 could be obtained pursuant to the co-channel upgrade provisions of Section 1.420(g)(3). However, Section 1.420(g) applies to construction permits and licenses, not to applicants. Thus, an applicant cannot, pursuant to that Section, obtain such a modification.

[10] In fact, although the proposed upgrade was not denied until after the applications were designated for hearing, the upgrade was proposed in the *NPRM* before designation for hearing. *See* footnote 3, *supra*.

[11] Crisler appears to be referring to his reliance, in seeking a waiver of the hearing designation fee for his application, on an informal statement of policy by Bureau staff concerning the circumstances in which an application filing window must be reopened, and on the detriment he suffered when his application was dismissed. Even assuming Crisler was justified in relying on such a statement, the dismissal of Crisler's application was not a result of that reliance, but instead was a result of Crisler's failure to properly seek a waiver by tendering the appropriate fee with his waiver request.

[12] *See* the *First Report and Order* in MM Docket 84-231, 50 Fed. Reg. 47391 (January 25, 1985).

[13] After the applications were filed in this proceeding, an amendment to the Commission's rules to provide for adjacent and co-channel upgrades without new filing windows became effective; the Commission determined that entertaining competing applications in such circumstances does not serve the public interest. *See FM Co-Channel and Adjacent Channel Upgrades*, 60 RR 2d 114 (1986), 47 C.F.R. § 1.420(g). However, the rule is expressly limited in applicability to upgrades involving licensees or permittees. Our decision here is without prejudice to any possible Rule Making proceeding to explore whether it might serve the public interest to adopt a similar rule to benefit applicants. We note that, in any event, the public will likely benefit from an upgrade here as the permittee for the Lafayette allotment apparently intends to upgrade to a Class C2 station pursuant to the co-channel upgrade provisions of Section 1.420 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PRIVATE TRANSATLANTIC
TELECOMMUNICATIONS
SYSTEM, INC.,
Licensee

RONALD D. COLEMAN,
JAMES J. McGILLAN AND
SHEARSON LEHMAN HUTTON
TRUST COMPANY
TRUSTEES,
Transferor,

and File No. SCL-89-001-TC

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Transferee,

APPLICATION FOR CONSENT TO TRANSFER OF CONTROL OF CORPORATION HOLDING CABLE LANDING LICENSE

MEMORANDUM, OPINION AND ORDER

Adopted: June 14, 1989; Released: June 26, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Commission has before it for consideration the above-captioned application, filed on March 20, 1989, requesting authority pursuant to an Act relating to the landing and operation of submarine cables in the United States, 47 U.S.C. §§ 34-39 (1988) (Cable Landing License Act), to transfer control of Private Transatlantic Telecommunications System, Inc. (PSI), formerly known as Tel-Optik, Ltd., from a Trust to US Sprint Communications Company Limited Partnership (US Sprint). US Sprint proposes to acquire all of the stock of PSI. The application was placed on public notice on March 24, 1989. No oppositions or other comments were filed in response to the application.

2. PSI is a corporation organized and existing under the laws of the State of Delaware and holds a cable landing license to land and operate two private transatlantic fiber optic cables (the PTAT cable system) between the United States and the United Kingdom.[1] The transferors of control of the licensee are Trustees: Ronald D. Coleman, James J. McGillan and Shearson Lehman Hutton Trust Company. The Trustees are the legal owners of all of the capital stock of PSI, pursuant to the terms and conditions of the Stock Purchase and Trust Agreement dated August 11, 1986 among PSI, the stockholders of PSI, the Trustees and NYNEX Development Corporation.[2]

3. The transferee, US Sprint, is a limited partnership organized and existing under the laws of the State of Delaware. US Sprint is a non-dominant carrier providing telecommunications services throughout the United States, including the U.S. Virgin Islands, Guam, Puerto Rico and to numerous international points pursuant to authority granted by the Commission. US Sprint is currently authorized to provide common carrier services between the United States and the countries to be served initially by the PTAT-1 cable described below. Such services are provided over both satellite and submarine cable circuits.

4. The PTAT cable system consists of two transatlantic fiber optic submarine cables and dedicated fiber optic terrestrial facilities from the landing points to the gateway cities listed below. The first cable, PTAT-1, is scheduled to become operational in mid-1989. In the United States, PTAT-1 will extend from terminals in the gateway cities of New York, New York and Philadelphia, Pennsylvania to the landing point at Sea Girt, which is located in the municipality of Manasquan, New Jersey. In the United Kingdom, the cable will land at Brean near Weston-Super-Mare, Somerset and extend to the gateway terminal at Bracknell, west of London. The PTAT-1 cable also consists of spurs to Bermuda and the Republic of Ireland. The Bermuda spur will land at Devonshire Bay, Bermuda; the Ireland spur will land at Courtmacsherry Bay and connect to the terminal located at Ballinspittle, County Cork.

5. In the United Kingdom, PTAT-1 will connect to the domestic system of Mercury Communications Limited ("Mercury"), the wholly-owned subsidiary of Cable and Wireless, plc ("C&W"), which is the owner of the foreign half of the PTAT cable system, or to other networks for the provision of services throughout the United Kingdom. In Bermuda, PTAT-1 will connect to C&W (Bermuda), Limited; in Ireland, PTAT-1 will be connected to the national network of Bord Telecom Eirann ("Eirann"). In addition, the PTAT-1 cable system will be extended by suitable facilities to the borders of other countries or to the terminals of other international communications systems (including cable terminals and satellite earth stations) thereby enabling the PTAT-1 common carrier facilities to be used to provide services to points beyond the PTAT-1 terminal countries.

6. US Sprint's general partner, United Telecommunications, Inc. (UTI), has agreed to purchase the stock of PSI, from the Trust that is the legal owner of all issued and outstanding shares of PSI's capital stock.[3] UTI has also assigned the rights and obligations under its purchase agreement to US Sprint.[4] Therefore, US Sprint will own PSI. Upon closing, PSI will remain the licensee to land the PTAT cables under the control of US Sprint.[5]

II. BACKGROUND

7. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international transmission facilities.[6] In reaching its policy decision, the Commission noted that the Construction and Maintenance Agreement (C&MA) for the PTAT cables provided for 50-50 ownership of each of the cables by Tel-Optik and C&W. The Commission thus concluded

that the C&MA contained sufficient reciprocal treatment for each party as required under the Cable Landing License Act and otherwise appeared to be consistent with United States interests, and Commission policy.[7] Pursuant to the Commission's findings, the Common Carrier Bureau granted to PSI, then Tel-Optik, Ltd., a cable landing license to land and operate in the United States the PTAT cable system.

8. In 1986, Tel-Optik filed two applications seeking authority for a two-step transfer of control of Tel-Optik to the NYNEX Development Company (NYNEX), a wholly-owned subsidiary of the NYNEX Corporation, a Bell Operating Company (BOC). The first application (SCL-86-003-2-(TC)) sought authority for the *pro forma* transfer of all shares of Tel-Optik stock to three trustees. The second application (SCL-86-003-1-(TC)) sought authority to transfer all shares of Tel-Optik from the trustees to NYNEX. The Common Carrier Bureau granted authority for the *pro forma* transfer of Tel-Optik's stock to the three trustees on November 19, 1986.[8] In 1987, the Commission found that the NYNEX proposal satisfied the reciprocity requirements of the Cable Landing License Act, as the Conditional Purchase Agreement (CPA) and related agreements stated that the international portion of all cable plant and equipment will be owned equally by the U.S. licensee and C&W and that " . . . the U.S. licensee will own all cable plant and equipment landing in the United States, whereas C&W will own all plant and equipment landing in the United Kingdom."[9] The Commission also found that, in view of the amendments to the agreement, the agreements did not " . . . raise concerns about whether a U.S. licensee and C&W will be equal partners in the venture or whether U.S. entities would be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable systems."[10] As a result, the Commission granted authority for the transfer of Tel-Optik's stock from the trustees to NYNEX on the condition that all relevant provisions of the Hart-Scott-Rodino Act be met.[11] In addition to the requirements of the Hart-Scott-Rodino Act, the Commission noted that the transfer of control could not be consummated prior to NYNEX Development's receipt of a waiver of Section II(D) of the Modification of Final Judgment (MFJ) by the District Court of Columbia to participate in international telecommunications.

9. On July 5, 1988, PSI filed a letter informing the Commission that C&W terminated its agreement with NYNEX pursuant to a condition of the CPA which provided that C&W could terminate the agreement if NYNEX was unable to obtain from the U.S. District Court, by July 1, 1988, a waiver of the MFJ to participate in international telecommunications.[12] Subsequently, C&W notified NYNEX that C&W was terminating the Agreement because no waiver of the MFJ had been granted by July 1, 1988. C&W, together with its U.S. partner PSI, was then free of all constraints to enter into discussions with other parties interested in acquiring the U.S.-end of the PTAT cable system.

III. DISCUSSION

a. The Cable Landing License Act

10. The Cable Landing License Act was enacted in 1921[13] requiring a person to obtain a written cable landing license, issued by the President of the United States, to land and operate submarine cables directly or indirectly connecting the United States with any foreign country. In 1934, the function of processing cable landing license applications under the Act was delegated to the Commission through executive order. The delegation of responsibility for processing cable landing license applications continued until 1954 when, by a new executive order, the Commission was delegated the responsibility of both processing applications and issuing licenses.[14] Under the new executive order, the Commission may not grant or revoke licenses without first obtaining approval of the Secretary of State. The Commission's Rules reflect this requirement. 47 C.F.R. § 1.767(a)-(b) (1988).

11. The Cable Landing License Act is intended to ensure that United States interests receive reciprocal treatment when there is a desire to lay cables from the United States to foreign points. The Act is designed, therefore, to protect the interests of the United States and its citizens in foreign countries in connection with the issuance of cable landing rights.[15] As a result, the Act prohibits a cable from being landed without prior authorization and also permits revocation of an existing authorization if a country fails to grant United States nationals reciprocal landing rights. While the Act was enacted at a time when transoceanic cables between the United States and foreign points were owned entirely by one entity, the Act also applies in situations where the cable ownership is shared by United States and foreign entities, as is the case with existing transatlantic cables jointly owned by U.S. carriers and foreign administrations. In the case of a U.S./foreign administration joint ownership arrangement, the reciprocity objectives of the Act are satisfied because the nature of such a relationship is necessarily based on partnership and reciprocal treatment.[16]

12. The Commission found in its *Private Submarine Cable* decision that we need not look beyond the Cable Landing License Act in examining an application for a license to land and operate private cables for the purpose of selling or leasing capacity on a non-common carrier basis.[17] The application to transfer control of PSI to US Sprint now before us is governed by the Cable Landing License Act.[18]

13. We find that the application contains the necessary information required by the Commission's Rules and otherwise satisfies the requirements under the Cable Landing License Act. Section 1.767 of the Commission's Rules requires an application to contain the name and address of the applicant; the corporate structure and citizenship of officers if the applicant is a corporation; a description of the submarine cable, including the type and number of channels and the capacity thereof; the location of the points on the shore of the United States and in foreign countries where the cable will land (including map); the proposed use, need and desirability of the cable; and such other information as may be necessary to enable the Commission to act on the application. 47 C.F.R. § 1.767(a). US Sprint has provided the Commission with this information.

14. In addition, we find that US Sprint has satisfied the threshold reciprocity requirement of the Cable Landing License Act. To this end, the issue of ownership and control of the different cable segments are critical factors in a Commission determination to permit cable landings on United States territory under the Cable Landing License Act.[19] In the present case, we note that the Stock Purchase Agreement attached to US Sprint's application provides that the Construction and Maintenance Agreement between PSI and C&W will remain in effect after the transfer of control of PSI stock to US Sprint is completed.[20] Hence, other than the change in the name of the U.S. owner of the PTAT cable system from Tel-Optik to PSI, we find no change in the ownership and control of the PTAT cable system under which we originally granted a Cable Landing License to PSI.[21] Namely, PSI, under the ownership and control of US Sprint, shall continue to own and control 100% of the United States backhaul facilities and it will maintain a one-half (50%) ownership and control of the entire submarine cable segment. Additionally, PSI shall maintain a 50% control on the Management Committee, under which all major decisions are made to direct the progress of the engineering, provision, installation, bringing into service, continued operation, and coordination of the PTAT cable system.[22] In order to ensure that our reciprocity requirements are met in the present case, we will condition this Order upon the continuation of these arrangements. There shall be no change in these arrangements except pursuant to Commission authorization upon review of an appropriate application.

b. Other Relevent Considerations

15. We further find that the grant of the present application will promote Commission policy aimed at introducing competition in the provision of international transmission facilities. As a general matter, the introduction of competition into a market has been deemed to be a significant and positive step that is beneficial to the public. The Commission has stated that competition benefits the public when it maintains or improves a service and enhances the economical and efficient provision of communications services.[23] Furthermore, the Commission has explained that the hallmark of a competitive market is the maximization of customer choice which can be effectuated by allowing multiple entrants. The opportunity to choose enables customers to influence the types of services available and encourages service providers to be responsive to customer needs in terms of price and service quality.[24]

16. In the *Private Submarine Cable Decision*, the Commission found that alternative private cable systems in which bulk capacity is sold or leased on a non-common carrier basis would introduce more meaningful competition in the provision of North Atlantic transmission facilities.[25] Furthermore, it held that such an increase in competition in the provision of facilities would stimulate technology and service development to the benefit of international telecommunications users. The Commission used these competition policies in support of its decision to grant PSI a Cable Landing License. In the present case, we find nothing in US Sprint's proposed acquisition of PSI that alters the competitive conditions under which we originally granted PSI's Cable Landing License. US Sprint is a vigorous competitor in the international message telephone (IMTS) market. Indeed, over the past 5 years, US Sprint or its predecessors have concluded 44 direct operating agreements to various foreign points, including direct operating agreements with those countries served initially by the PTAT-1 cable. Furthermore, we find that US Sprint brings to this arrangement technical expertise in the field of international telecommunications, and in particular, fiber optic networks. US Sprint has gained considerable technical experience with its domestic fiber optic network, sufficient to develop, construct, and operate the PTAT cable system consistent with the public interest of the United States.[26] Hence, we find that US Sprint's aqcuisition of PSI in the present case furthers the Commission's pro-competitive policies and is, therefore, in the public interest.

17. Finally, the Commission has held that in order to reach a final determination of whether the proposed transaction will promote the public interest, we must consider any potential anticompetitive consequences of the transaction on U.S. telecommunications markets. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[27] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of common carriers engaged in wire or radio transmissions of energy."[28] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[29] In the present case, we note that recent Commission data show that US Sprint's IMTS market share between the United States and other countries totaled 2.6% as of 1987.[30] Thus, we find that US Sprint's small market share of the current IMTS market prevents it from having any anticompetitive impact on the IMTS market through its acquisition of the PTAT cable system.

18. Based on the record before us, we conclude that US Sprint's proposed acquisition of PSI will promote competition in transatlantic communications, provide users with new facility and ownership options, and advance generally the U.S. public interest. We therefore grant the application. In reaching this conclusion, we determine that the application contains all required information and that US Sprint's proposal has satisfied the reciprocity requirements of the Cable Landing License Act.

c. Department of State Approval

19. Finally, the Commission solicited the Department of State's position on whether to grant the application, pursuant to Executive Order 10530.[31] The Department of State supports US Sprint in this ownership venture of the PTAT cable system. The Department of State notes that US Sprint's application advises that, upon closing, US Sprint will own the United States half of the PTAT cable system. Therefore, pursuant to the Cable Landing License Act and Executive Order 10530, the Department of State approves the transfer of control of the affected cable landing licenses. The Department of State adds that this approval has been coordinated with appropriate Executive Branch agencies.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. §§ 34-39, that the application (File No. SCL-89-001-TC) of Private Transatlantic Telecommunications System, Inc., its trustees and US Sprint Communications Company Limited Partnership for transfer of control of Private Transatlantic Telecommunications System, Inc. to US Sprint Communications Company, Inc. is GRANTED consistent with the terms and conditions set forth in this Order.

21. It is FURTHER ORDERED that PSI, under the ownership and control of US Sprint, shall continue to own and control 100% of the United States backhaul facilities of PTAT-1 and shall maintain a 50% ownership and control of the entire submarine cable segments of PTAT-1.

22. It is FURTHER ORDERED that the ownership of the assets of PTAT-1 shall be placed in the name of PSI Delaware - under the control of US Sprint - within 90 days of the consummation of US Sprint's purchase of PSI stock.

23. It is FURTHER ORDERED that PSI, under the ownership and control of US Sprint, shall maintain a 50% control of the Management Committee (*see* Section 10 of the Construction and Maintenance Agreement).

24. It is FURTHER ORDERED that all conditions of the original license granted to PSI remain the same.

25. This Order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Tel-Optik, Limited, 100 FCC 2d 1033 (1985) (hereinafter *Private Submarine Cable Decision*).

[2] Transfer of control of PSI to the Trust was granted by the Chief, Common Carrier Bureau, In re Application of Tel-Optik Limited, Request for Approval of *Pro Forma* Transfer to Trust, 1 FCC Rcd 742 (Com. Car. Bur. 1986).

[3] *See* the March 4, 1989 Stock Purchase Agreement by and among United Telecommunications, Inc. and Trustees, appended to the application.

[4] *See* Assignment, appended to the application.

[5] Additionally, US Sprint filed with the Commission various agreements between and among PSI, its shareholders, and its trustees, US Sprint, and C&W governing the proposed transfers of control. US Sprint has requested that these agreements be kept confidential.

[6] *See Private Submarine Cable Decision.*

[7] *Id.* at 1044. For a discussion of the requirements under the Cable Landing License Act, 47 U.S.C. §§ 34-39, *see* paragraphs 10-12, *infra.*

[8] Tel-Optik, Limited, *Pro forma* Transfer to Trust, 1 FCC Rcd 742 (Com. Car. Bur. 1986).

[9] Tel-Optik, Limited, Request for Approval of Transfer of Control, 2 FCC Rcd 2276, 2277 (1987) (hereinafter *Tel - Optik, Ltd.*).

[10] *Id.*

[11] 47 U.S.C. § 18(a). The Hart-Scott-Rodino Act provides, with respect to proposed transfers of corporate stock falling under certain specified criteria, for notification and review by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. The receipt of such notification triggers a waiting period which must expire or be terminated before the parties may proceed with the transaction.

[12] *See* July 5, 1988, Press Release, Cable and Wireless plc, Corporate Press Office, Mercury House 110-124 Theobalds Road, London, WC1X 8RX.

[13] May 27, 1921, c. 12, 42 Stat. 8 (1921); currently found in 47 U.S.C. §§ 34-39 (1985).

[14] The current delegation to the Commission is provided in Executive Order No. 10530, dated May 10, 1954.

[15] Section 35 of the Act provides, in part:

> The President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon the terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.

47 U.S.C. § 35 (1988).

[16] *Private Submarine Cable Decision*, 100 FCC 2d at 1044.

[17] US Sprint has filed a separate Section 214 application (File No. I-T-C-89-084 (filed March 24, 1989)) for the proposed provision of common carrier services over PTAT. That application will be considered in a separate proceeding.

[18] *Tel - Optik, Ltd.*, 2 FCC Rcd at 2277 (1987).

[19] Indeed, in its decision to grant Tel-Optik's request to transfer control of Tel-Optik to NYNEX, the Commission stated:

> We find that NYNEX Development's proposal has satisfied the reciprocity requirements of the Cable Landing License Act. The Agreements governing the proposed transfers of control state that the international portion of all cable plant and equipment will be owned equally by the U.S. licensee and C&W. The Agreements specify that the U.S. licensee will own all cable plant and equipment landing in the United States, whereas C&W will own all plant and equipment landing in the United Kingdom. In addition, in view of the amendments filed to the Agreements, . . . we find that the Agreements do not raise concerns about whether the U.S. licensee and C&W will be equal partners in the venture or whether U.S. entities would be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cables.

Tel - Optik, Ltd., 2 FCC Rcd at 2277.

[20] The Cable Construction and Maintenance Agreement between PSI and C&W states that:

> *7. Ownership of Segments and Additional Property*
>
> 7.1 Segment A (the submarine cable) of Market-Link (PTAT) *shall be owned in common and in equal undivided shares* by the Parties. (emphasis added)
>
> 7.2 Segment B (U.S. backhaul facilities) of (PTAT) *shall be owned* by Tel-Optik (PSI). (emphasis added)
>
> 7.3 Segment C (U.K. backhaul facilities) of (PTAT) *shall be owned* by C&W. (emphasis added)
>
> 7.4 In this Agreement references to any Segment or Sub-segment, however expressed, shall be deemed to include, unless the context otherwise requires, additional property incorporated therein by agreement of the Parties. Each Segment and Sub-segment shall be regarded as including its related spare and standby units and components including, but not limited to, repeaters, cable lengths and terminal equipment.
>
> . . .

Section 7, Market-Link, Joint Ownership, Construction, and Maintenance Agreement, signed 1984. According to US Sprint, there have been no changes made to the C&MA in this proceeding.

[21] Upon review of the application and attachments, the ownership of the assets of the submarine portion of PTAT-1 appears to have been transferred from PSI Delaware to PSI Bermuda. PSI Bermuda is owned in full by PSI Delaware, but is incorporated in Bermuda. This transfer should not have been made absent the filing of an appropriate application with the Commission, and the approval of the Commission and the Department of State. *See Private Submarine Cable Decision*, 100 FCC 2d 1033; Cable Landing License Act, 47 U.S.C. § 35. Therefore, to remedy this situation, we shall require that the ownership of the assets of PTAT-1 shall be returned to PSI Delaware - under the control of US Sprint - within 90 days of the consumation of US Sprint's purchase of PSI's stock.

[22] *Id.* at Section 10.

[23] *See* FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953); *see also* Telocator Network of America v. FCC, 69 F.2d 525 (D.C. Cir. 1982).

[24] *See* In the Matter of Establishment of Satellite Systems Providing International Communications, Report and Order, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985)(hereinafter *Separate Systems)*.

[25] *Private Submarine Cable Decision*, 100 FCC 2d at 1040.

[26] In authorizing the transfer of control of Tel-Optik, Ltd. to NYNEX Development, *Tel - Optik, Ltd.*, the Commission stated that technical expertise is invaluable to the optimal development, construction, and operation of private international submarine cable facilities and the ability of the owners of such facilities to compete in the provision of international telecommunications services. *Id.* at 2277. The Commission also looked at the adequateness of NYNEX Corporation's financial resources in determining whether to approve of the transfer of control of the cable ownership to NYNEX Development, a wholly owned subsidiary of NYNEX Corporation. NYNEX Corporation, a Bell Operating Company, is a dominant carrier for the provision of local telephone service. Therefore, the Commission was concerned that NYNEX would use its financial resources in such a way that its entry into the private cable market would undermine the provision of local telephone service by the NYNEX Telephone Companies. This concern is not present in the matter before us. The importance of US Sprint's financial resources is not a factor in our decision to grant authority to transfer control of PSI stock to US Sprint. US Sprint is a non-dominant carrier for the provision of both international and domestic long-distance telephone service, and because of the competitiveness of the international long-distance market, any change in the service quality or rates of US Sprint's long-distance service would be a reflection of the business decisions made by US Sprint and, as such, consumers could simply change carriers if the results of these decisions are not to their satisfaction.

[27] *See* 15 U.S.C. § 18. The Commission's power to enforce this provision is applicable only to transfers of control involving common carriers. We believe, however, that a necessary part in our determination of whether a transaction will promote U.S. interests involves a consideration of all potential anticompetitive consequences. *See Tel - Optik, Ltd.*, 2 FCC Rcd at n. 13.

[28] 15 U.S.C. § 21.

[29] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[30] *See* "Trends in the International Telecommunications Industry, 1975-1987," Industry Analysis Division, Common Carrier Bureau, Table 9 (October 1988).

[31] Commission rules state that when, by executive order, the Commission was delegated the responsibility of processing applications and issuing licenses pursuant to the Cable Landing License Act, this authority was conditioned upon the Commission's not granting or revoking licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department or establishment of the U.S. Government as it may deem necessary. 47 C.F.R. § 1.767 (a)-(b) (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Associated Information
Services Corporation

7320-02/M-2391

Requests for Declaratory Ruling and Waiver and Extension of the Multiple Address System Construction Provisions of Section 94.51(a) of the Commission's Rules.

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 21, 1989

By the Commission:

I. INTRODUCTION

1. On October 24, 1988, Associated Information Services Corporation (AIS) filed a petition for reconsideration of this Commission's *Memorandum Opinion and Order and Declaratory Ruling* (*AIS Order*), 3 FCC Rcd 5617 (1988). AIS, a multiple address system (MAS)[1] licensee, seeks reversal of (1) our determination that the installation of master stations without remote stations fails to comply with the MAS operational provisions of Section 94.51(a) of the Commission's Rules, 47 C.F.R. § 94.51(a);[2] and (2) our denial of AIS' alternative request for waiver of the operational requirements specified in Section 94.51(a) of the Rules. [3] For the reasons set forth below, we deny AIS's petition for reconsideration.

II. BACKGROUND

2. AIS attempted to develop a nationwide system for transmitting one-way data using unpaired 956 MHz frequencies that are assigned for use in the Private Operational-Fixed Microwave Service, governed by Part 94 of our Rules, 47 C.F.R. §§ 94.1 - 94.199. To implement its nationwide plans, AIS applied for and was initially granted licenses for 147 one-way MAS stations with locations in 147 different cities throughout the country. These licenses were issued during the period April 1984 through August 1987.

3. In April of 1987, Commission field engineers inspected three of AIS's 147 MAS stations to determine if these stations were placed in operation in a timely manner, i.e., within one year of the initial license grant. The engineers found that the stations were not operational.[4] AIS subsequently admitted that, with the exception of its New York station,[5] none of AIS's 147 authorized systems were operational. AIS indicated that it had submitted licenses for cancellation for 54 stations because neither master nor remote stations were constructed for these facilities. It sought to retain, however, its authorizations for systems in the remaining 92 cities, asserting that its installation of master stations for these systems constituted substantial compliance with the construction requirement of Section 94.51(a). In the alternative, AIS argued that it was entitled to a waiver of the construction provisions of this rule section. We declined to grant the relief requested by AIS. AIS now seeks reconsideration of our decision.

III. DISCUSSION

4. In support of its request for reconsideration, AIS essentially repeats arguments that were previously raised in its original petition and considered and rejected by this Commission.[6] AIS reiterates that the rules did not require a minimum of four operating remote stations at the time the majority of its MAS stations were initially authorized. Consequently, AIS again maintains that its construction of only master stations for each MAS facility within 12 months of each initial authorization was in good faith and in substantial compliance with the operational requirements of Section 94.51(a).

5. AIS's contention that its construction of master stations without remotes complies with our construction and implementation requirements remains unconvincing. The construction of a master station without remotes does not allow any authorized communications services. The purpose of Section 94.51(a) is to ensure that the limited number of MAS frequencies available are promptly used by licensees to provide service or are reassigned to other prospective licensees.[7] This is particularly important since AIS's numerous unused authorizations represent a substantial portion of the limited one-way spectrum in many areas of the country. Accordingly, we affirm our determination that the installation of MAS master stations without remotes does not comply with the provisions of Section 94.51(a). By definition, an MAS system is not operational and cannot therefore meet the requirements of Section 94.51(a) if it has only a master station and no remotes. Indeed, AIS admits the stations are not operational. Instead, it argues it has "substantially" complied with Section 94.51(a). Nothing in Section 94.51(a) or case precedent suggests, however, that "substantial" rather than actual compliance is sufficient.[8]

6. AIS also has furnished no new arguments regarding its request for a waiver and extension of the one year operational provision of Section 94.51(a) of the Rules. Rather, AIS has simply repeated its claim that its considerable expenditures associated with the development of its digital network system and the unanticipated and unavoidable equipment delays it reportedly experienced that were incidental to the development of this new technology warrant our grant of a rule waiver. As noted in our *Order*, we are not persuaded by this argument. Both this Commission and the courts have consistently held that the consequences of independent business decisions do not release a licensee from its responsibility to implement its stations in accordance with our rules.[9] Further, our denial of AIS's waiver request reflected the fact that Section 94.51(a) gives an MAS licensee a reasonable opportunity to seek an extension of time to construct upon a showing of good cause. The rule specifically provides that requests for extension of time must be submitted at least 30 days prior to the end of the 12-month implementation period. If the licensee either fails to construct, or to seek a timely extension of time, the license cancels automatically.

7. As we stated in the *Order*, the extension of time provision is an essential part of our implementation enforcement efforts. It encourages compliance with the one-year operational requirement and places the burden on the licensee to seek timely extensions where necessary.[10] AIS failed either to place its systems in operation or to timely request extensions of the 12-month implementation period.[11] AIS has provided no additional information to contradict our conclusion that it failed to take even the minimal steps necessary to maintain its licenses. Under these circumstances, our channel recovery and reassignment policies should be enforced and we affirm our denial of the requested waiver.[12]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Associated Information Services, Inc., on October 24, 1988, in the above captioned proceeding IS DENIED.

9. IT IS FURTHER ORDERED that Associated Information Services, Inc.'s May 5, 1989 settlement proposal IS DENIED.

10. IT IS FURTHER ORDERED that Associated Information Services, Inc., must return the cancelled license documents for the stations listed in Appendix A as required by Section 94.51(a) of the Rules.[13]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

ASSOCIATED INFORMATION SERVICES CORPORATION MAS LICENSES THAT HAVE CANCELLED AUTOMATICALLY

MARKET	CALL SIGN
BIRMINGHAM, AL	WNEE 261
MONTGOMERY, AL	WNEI 757
LITTLE ROCK, AR	WNEI 867
FLAGSTAFF, AZ	WNEJ 867
PHOENIX, AZ	WEG 746
TUCSON, AZ	WEG 714
BAKERSFIELD, CA	WNEK 211
FRESNO, CA	WNEE 263
SACRAMENTO, CA	WHK 549
SAN DIEGO, CA	WEH 462
SAN FRANCISCO, CA	WHI 729
SAN JOSE, CA	WNEE 271
SAN LUIS/OBISPO, CA	WNEI 766
COLORADO SPRINGS, CO	WNEI 772
DENVER, CO	WNEE 273
GRAND JUNCTION, CO	WNEI 774
PUEBLO, CO	WNEK 210
HARTFORD, CT	WNEI 770
WASHINGTON, D.C.	WHP 47
JACKSONVILLE, FL	WEF 771
MIAMI, FL	WLH 63
ORLANDO, FL	WHI 367
TALLAHASSEE, FL	WNEI 769
TAMPA, FL	WHI 659
WEST PALM BEACH, FL	WNEE 264
ATLANTA, GA	WEH 331
MACON, GA	WNEI 771
DES MOINES, IA	WEG 933
BOISE, ID	WNEJ 868
CHICAGO, IL	WHI 866
INDIANAPOLIS, IN	WEG 454
WICHITA, KS	WNEI 868
LOUISVILLE, KY	WNEI 869
BATON ROUGE, LA	WNEI 768
NEW ORLEANS, LA	WEG 464
SHREVEPORT, LA	WNEI 767
BOSTON, MA	WEH 838
BALTIMORE, MD	WGY 694
GRAND RAPIDS, MI	WNEI 870
KALAMAZOO, MI	WNEK 209
LANSING, MI	WNEK 208
DULUTH, MN	WNEI 765
ST. CLOUD, MN	WNEI 753
KANSAS CITY, MO	WNEE 272
ST. LOUIS, MO	WEH 908
JACKSON, MS	WNEJ 866
CHARLOTTE, NC	WNEI 871
RALEIGH, NC	WNEE 265
WINSTON-SALEM, NC	WNEJ 865
LINCOLN, NE	WNEI 754
OMAHA, NE	WNEI 756
ALBUQUERQUE, NM	WEG 932
LAS VEGAS, NV	WNEI 755
ALBANY, NY	WNEI 799
MINNEAPOLIS, MN	WEG 937
ROCHESTER, NY	WHI 366
SYRACUSE, NY	WNEI 866
AKRON, OH	WNEI 763
CINCINNATI, OH	WEH 750
CLEVELAND, OH	WNEO 257
COLUMBUS, OH	WNEI 872
DAYTON, OH	WNEI 502
OKLAHOMA CITY, OK	WNEE 268
TULSA, OK	WNEI 873
PORTLAND, OR	WNEE 270
PHILADELPHIA, PA	WEH 819
PITTSBURGH, PA	WEV 90
SCRANTON, PA	WNEI 762
PROVIDENCE, RI	WNEI 764
CHARLESTON, SC	WNEI 761
GREENVILLE, SC	WNEI 501
SIOUX FALLS, SD	WNEJ 864
KNOXVILLE, TN	WEG 745

MEMPHIS, TN	WNEE 269
NASHVILLE, TN	WNEK 256
DALLAS, TX	WED 676
EL PASO, TX	WEG 930
SAN ANTONIO, TX	WNEI 500
OGDEN, UT	WNEI 759
SALT LAKE CITY, UT	WNEI 800
NORFOLK, VA	WEG 455
SEATTLE, WA	WEH 545
SPOKANE, WA	WNEJ 863
MADISON, WI	WNEI 758
MILWAUKEE, WI	WHI 368

FOOTNOTES

[1] Section 94.3 of the Commission's Rules, 47 C.F.R. § 94.3, defines a multiple address system as a one-way or two-way microwave radio system that normally consists of a fixed or mobile master station that receives or transmits in an omni-directional pattern to and from multiple (four or more) fixed remote stations.

[2] Section 94.51(a) provides that multiple address system (MAS) stations must be placed in operation within 12 months from the date of the initial license grant; that the authority to operate MAS stations that are not placed in operation within 12 months of the initial license grant cancels automatically; and that requests for extension of time to construct and place in operation such a station must be submitted no later than 30 days prior to the expiration of this 12 month period.

[3] AIS filed timely extension requests for five of its stations. The Commission granted those requests. The Commission concluded that the timely extension request was the vehicle contemplated by Section 94.51(a) of the Rules for seeking relief from the one year operational requirement and that the grant of an extension under these circumstances did not require a rule waiver. *See AIS Order*, at para. 18.

[4] The stations inspected were located in New Orleans, Louisiana (WEG 464), Dallas, Texas (WED 676) and Norfolk, Virginia (WEG 455). With regard to the New Orleans and Norfolk stations, the inspecting engineers determined that while master stations were installed and attached to antennas at each location, there were no remote stations constructed for either system. Although the engineers were unable to gain access to the Dallas transmitter site, monitoring of the frequency revealed no evidence of station operation.

[5] AIS constructed the master station and the requisite four remote stations for its New York station within one year of the initial license grant. This station was placed in operation for demonstration to potential AIS customers and has served as AIS's prototype station. Since the station was placed in operation in a timely manner, the license for this station did not cancel automatically.

[6] *See* AIS Request for Declaratory Ruling, June 15, 1987.

[7] *AIS Order* at para. 14.

[8] This conclusion can be made without regard to whether the definition of what constitutes an MAS station under Section 94.3 changed during the period in question. *See AIS Order*, fn. 8.

[9] *Id.* at para. 17.

[10] *Id.* at paras. 13-14.

[11] On the contrary, we extended the implementation period for the five systems for which AIS made timely requests for extensions of time, as required by Section 94.51(a).

[12] On May 5, 1989, AIS proposed a compromise resolution wherein AIS would agree to surrender for cancellation its MAS licenses for facilities in all but 20 selected cities and to initiate operations on those retained stations within six months. As discussed above, our Part 94 channel recovery policies should be enforced. AIS has not convinced us that the public interest would be better served by granting it additional time to attempt to initiate service on these scarce frequencies in 20 cities. Accordingly, we deny AIS's settlement proposal.

[13] These stations were listed in Appendix A of the Commission's Order, 3 FCC Rcd at 5619-20. AIS has postponed the return of these station licenses pending the disposition of its request for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Arnold L. Chase
(Transferor)

File No. BTCCT-851030KF

and

Chase Broadcasting, Inc.
(Transferee)

For Transfer of Control of Arch Communications, Inc., Licensee of Station WTIC-TV, Hartford, Connecticut.

ORDER

Adopted: June 12, 1989; Released: June 21, 1989

By the Chief, Mass Media Bureau:

1. Astroline Communications Co., L.P. (Astroline), is the licensee of station WHCT-TV, channel 18, Hartford, Connecticut. On March 24, 1989, Astroline filed a pleading entitled "Motion for Stay," which is related to the transfer application described in the caption, and which we consider here. The petition is opposed by Arch Communications Corp. (Arch), licensee of station WTIC-TV, channel 61, Hartford, Connecticut.

2. Astroline requests the Bureau, pursuant to delegated authority, to "stay" the Commission's action in *Arnold L. Chase*, 61 R.R.2d 111 (1986), in which the Commission rejected several petitions to deny and granted the application to permit the transfer of control of Arch from Arnold L. Chase to Chase Broadcasting, Inc. The parties closed the transaction on October 2, 1987. Astroline, one of the petitioners in that case, successfully appealed the Commission's decision. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The court directed the Commission to consider whether a hearing was required on four specified issues. The staff recently requested comments from the parties in preparation for consideration of the court's remand.

3. The Commission's Rules establish *effective* dates for its actions. 47 C.F.R. §1.103 (1987). Although a decision is not *final* until Commission and court review is over, parties are free to act on the basis of effective decisions, unless stayed. *Id.* The parties to a sale, therefore, may close the transaction when the Commission's decision is effective, but before finality. They proceed at their own risk in such cases, however, because the Commission or the courts may later require the sale to be undone. *See, e.g., Improvement Leasing Co.*, 73 F.C.C.2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981).

4. A stay is ordinarily requested to maintain the *status quo*. Astroline did not seek a stay from the Commission or the court before the consummation of the transfer. The applicants in this case closed the sale after the effective date. A motion for stay at this time is therefore moot. We shall therefore construe Astroline's petition as an informal request for Commission action, filed pursuant 47 C.F.R. §1.41, by which Astroline seeks a return of control of the WTIC-TV license to the seller, pending consideration of the court's remand. We view Astroline's petition, like a motion for stay, as a request for extraordinary relief. It is accordingly appropriate to use here the standards ordinarily applied to stay requests. Both parties have pleaded their case on that basis so no unfairness to them results from using stay criteria.

5. The Commission has adopted a four-element standard, based on the judicial model, by which to review requests for stays, and which we apply to Astroline's pending request for extraordinary relief: (1) the likelihood of irreparable injury to the petitioner in the absence of relief; (2) the injury to other parties in the proceeding that might follow if relief is granted; (3) the injury to the public interest that might result if the petition is granted; and (4) the likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal. *See, e.g., Storer Communications, Inc.*, 101 F.C.C.2d 434 (1985); *Washington Area Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir 1977); and *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (" *Petroleum Jobbers* ").

6. To qualify as "irreparable injury," the harm to the petitioner must be "both certain and great: it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985) (*per curiam*). Moreover,

> Mere injuries, however substantial, in terms of money, time and energy expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Petroleum Jobbers, 259 F.2d at 925. With that background, we consider the allegations of the parties with respect to the enumerated four factors.

7. *Irreparable Injury* Astroline's claim of irreparable injury is briefly stated. It alleges that it is reorganizing under the bankruptcy laws and is now a debtor in possession, under the supervision of the United States Bankruptcy Court for the District of Connecticut. Part of that reorganization includes obtaining additional financial support. Astroline contends that the presence of "an extensive media group" in Hartford, (that is, the combined WTIC, WTIC-FM and WTIC-TV stations) discourages potential investors, aggravating its financial condition. Astroline also alleges that Arch benefits from the economies of scale that flow from a combined operation. Given its financial condition and uncertain future, Astroline states, a Commission decision "a year from now may be too late."

8. In reviewing Astroline's allegations, we take official notice of several facts. Arbitron lists five television stations, in addition to those licensed to Arch and Astroline, as serving the Hartford/New Haven, Connecticut market, composed of three network affiliates (two VHF and one UHF),[1] and two nonnetwork UHF stations.[2] These stations provide Grade B or better service to all or substantially all of the State of Connecticut. Other television

services are provided by the 26 cable television systems located in Connecticut, which serve 166 communities and 850,806 subscribers. [3] Astroline must compete for viewers and revenues with all these media outlets. Except for station WTIC-TV, that competition will remain the same if we act favorably on Astroline's petition for extraordinary relief. Further, if the requested relief were granted, Astroline would still compete with station WTIC-TV. The only difference in the competitive market would be the loss to station WTIC-TV of whatever economies of scale and additional resources that are available from its combination with stations WTIC and WTIC-FM. On its face, such a difference would constitute a very small part of the totality of Astroline's competition. As noted, the loss of "money, time and energy" that may result from the radio/television combination is not the basis for a stay. *Petroleum Jobbers*, 249 F.2d at 925. Further, Astroline does not allege that it will go off the air if relief is not granted. It states only that setting aside the sale a year from now " *may* be too late." (Emphasis added.)[4] We also note that the result sought by Astroline may occur if the Commission should later decide that a hearing is necessary on the transfer application, and if Astroline's contentions prevail in that hearing. We find, therefore, that the alleged injuries are not "certain and great," and that "other corrective relief" may be "available in the ordinary course of litigation." Accordingly, we conclude that Astroline has failed to demonstrate matters that constitute irreparable injury.

9. *Harm to Other Parties* Astroline asserts that returning control of station WTIC-TV to the seller would cause no substantial harm to other parties. It states that other licensees in the market will not be injured. Astroline also contends that Arch will not be substantially harmed by the requested relief. It recognizes Arch's losses before the consummation of the transfer, but believes that Arch could meet expenses with "prudent spending measures" or "additional financing from either prior or new investors." In opposition, Arch contends that granting the Astroline petition would disrupt established relationships with program suppliers, lenders and other creditors, which in turn would delay placing station WTIC-TV on a sound financial footing. Arch also contends that such a change in control would delay the imminent initiation of a nightly, half-hour news program.

10. We agree with Astroline that stations other than WTIC-TV would not be significantly harmed by a grant of its request. With regard to WTIC-TV, however, we note that the sale proceeded in a situation where none of the several petitioners sought a stay of the Commission's grant. Thus, the parties closed taking the risk of undoing the transaction if the Commission later changed its determination on the merits. We believe it is clear that they did not take the risk that a party, which did not file a motion for stay, should later seek the extraordinary relief of setting aside the transaction before a ruling on the merits. We agree with Arch that retransferring the license at this time would cause disruptions and impose other burdens on Arch. We also recognize that one of the possibilities in the future may be that the station will revert to control by the seller, after consideration in a hearing, if necessary, on the issues raised by the court. Such an action now, however, would create current, unnecessary problems, if the Commission should later determine that no hearing is required or that the application could be granted after a hearing is held. We conclude that the equities are on Arch's side and that there would be harm to Arch if we were to grant Astroline's petition.

11. *Harm to the Public Interest* Astroline briefly contends that the public interest would be served by a grant of its request. Other stations in the market would be able to compete more effectively in Astroline's opinion, because a grant of its petition would diminish the "dominance of the Chase media interests" and prevent Arch from benefitting financially from its combination.[5] Arch, in contrast, finds harm to the public interest if the petition is granted. Such an action would assertedly reduce the level of competition among nonnetwork stations and impair the quality of program service provided.

12. We find no particularly decisive factor in the pleadings on the question of the harm to the public interest. Both sides have pleaded this factor only briefly and in a conclusory manner. Because the burden of making a case for extraordinary relief falls on the petitioner, however, we can conclude that Astroline has failed to establish support for its request.

13. *Likelihood of Success on the Merits* We do not believe that this factor is properly considered in this case. The issue as to whether a hearing is required is under review, and a staff decision on that question is premature. That determination will be based on the court's decision and the record before the Commission, as augmented by any supplemental material provided in response to our recent request for updated information. If a hearing is required, the likelihood of success on the merits can only be determined on the record developed in such a hearing.

14. In conclusion, we find that Astroline has failed to establish that it would suffer irreparable injury. Nor does it appear that the public interest would be significantly affected by denying Astroline's petition. It does appear that there is a degree of harm that would result to Arch if the petition were granted. Balancing the equities, using the factors set out above, we conclude that Astroline has failed to establish the present need for extraordinary relief of returning control of station WTIC-TV to the seller.[6]

15. Accordingly, IT IS ORDERED, That the request for extraordinary relief filed by Astroline Communications Co., L.P., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] These stations are: WFSB(TV), channel 3, Hartford (CBS); WTNH-TV, channel 8, New Haven (ABC); and WVIT(TV), channel 30, New Britain (NBC). *1988 Television and Cable Factbook*, Stations Volume, pages A-1 and A-188-A-194.

[2] These stations are: WTWS-TV, channel 26, New London; and WTXX(TV), channel 20, Waterbury. *Id.*

[3] *1988 Television and Cable Factbook*, Services Volume, page B-166.

[4] We do not decide here that where a station goes dark because it is unable to survive the competition in its market that the station suffers a cognizable "irreparable injury" requiring Commission intervention to alter the competitive environment. The point here is that the only "irreparable injury" asserted by the petitioner in this case is not that it *will* go dark, but only that it *may* be forced off the air. It has provided no specific support for this assertion, except that the licensee is reorganizing under the bankruptcy laws. Reorganization is ordinarily followed where the debtor and creditors in the long term will be better protected by the continuation of the business than by liquidation.

[5] The alleged financial interest benefits to Arch are, in fact, a private factor, not a public interest factor.

[6] The remanded case is complex and has an extensive record. Nevertheless, the staff will make every effort to bring the remanded proceeding to the full Commission as promptly as possible after its review of the record and any supplemental material provided.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 303 and 307
GTE TELEPHONE OPERATING COMPANIES Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 484, 494, and 496
NEVADA BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 1	Transmittal No. 86

ORDER

Adopted: June 14, 1989; Released: June 15, 1989

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff transmittals, filed between February 10, 1989, and May 11, 1989,[1] propose individual case basis (ICB) rates for DS3 service. These tariff revisions are scheduled to become effective between June 16, 1989, and June 25, 1989. Transmittal Nos. 303 and 307, filed by the Ameritech Operating Companies (Ameritech) propose ICB rates that conform to the rate structure of its pending general DS3 tariff. GTE Operating Companies (GTOC) Transmittal Nos. 484 and 496[2] modify their ICB rates to conform to GTOC's proposed general offering. Nevada Bell Telephone Company Transmittal No. 86 establishes a Special Arrangement for LO-AD Communications, which Nevada Bell states is outside the scope of its general tariff for DS3 services.

2. On March 28, 1988, the Common Carrier Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[3] The offerings proposed in the captioned transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 303 and 307, GTE Operating Companies Tariff F.C.C. No. 1, Transmittal Nos. 484, 494 and 496, and Nevada Bell Tariff F.C.C. No. 1, Transmittal No. 86 are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the LECs listed in paragraph 3, *supra*, may file tariff revisions to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-422.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED, that pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Transmittal No. 303, Tariff F.C.C. No. 2, filed May 3, 1989, and Transmittal No. 307, Tariff F.C.C. No. 2, filed May 11, 1989; GTE Operating Companies, Transmittal No. 484, Tariff F.C.C. No. 1, filed February 10, 1989, Transmittal No. 494, Tariff F.C.C. No. 1, filed April 14, 1989, and Transmittal No. 496, Tariff F.C.C. No. 1, filed April 24, 1989; and Nevada Bell Telephone Company, Transmittal No. 86, Tariff F.C.C. No. 1, filed May 5, 1989.

[2] *See* GTE Telephone Operating Company, Application No. 213, filed June 8, 1989.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846; Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 14, 1989

ADVISORY COMMITTEE ON
ADVANCED TELEVISION SERVICE

A meeting of the Advisory Committee on Advanced Television Service will be held on:

July 19, 1989
2:00 P.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Approval of the last meeting's minutes
3. Financial report
4. Progress reports of the three subcommittees
5. Progress reports from testing laboratories
6. Consideration of draft testing plans
7. Date and location of next Steering Committee meeting
8. Other business
9. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Advisory Committee Chairman.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or Alex D. Felker at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 14, 1989

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE STEERING COMMITTEE

A meeting of the Steering Committee of the Advisory Committee on Advanced Television Service will be held on:

July 10, 1989
2:00 P.M.
Federal Communications Commission
Commission Meeting Room, Room 856
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Approval of the last meeting's minutes
3. Financial report
4. Progress reports of the three subcommittees
5. Progress reports from testing laboratories
6. Consideration of draft testing plans
7. Date and location of next Steering Committee meeting
8. Other business
9. Adjournment

Interested parties may submit written statements at this meeting. Oral statements and discussion will be permitted under the direction of the Steering Committee Chairman.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or David R. Siddall at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. Nos. 7 and 9

Transmittal No. 1541

International Volume Pricing Program

ORDER

Adopted: April 12, 1989; Released: April 14, 1989

By the Chief, Common Carrier Bureau:

1. On March 10, 1989, AT&T Communications (AT&T) filed the above-captioned transmittal to establish an International Volume Pricing Program. Discounts under the pricing program would be based on the customer's total monthly billing for the services covered by the program and the duration of the customer's commitment to one or all of those services. On March 17, 1989, TRT Telecommunications Corporation (TRT) filed a petition to reject, or in the alternative, to suspend and investigate.[1]

2. AT&T's proposed discounts under the pricing program cover four international private line services -- International Accunet Digital Service, International Dataphone Digital Service, Skynet International Shared Earth Station Service, and Private Line Voice Grade Foreign Overseas Half Channel Service. AT&T would give the customer the choice of accepting the discounts in one of two forms. The customer could accept a cash discount which AT&T would make available on an annual basis at the end of the plan year, or the customer could take the discount in the form of a credit which would be applied to the customer's International Long Distance (ILD) bill.[2] The amount of the discount would be based on the amount of the customer's total monthly billing for the covered services and the duration of the customer's commitment to subscribe to those services.

3. TRT asserts that AT&T's transmittal would grant preferential treatment to large volume users, such as corporations and government entities. TRT Petition at 1-2. TRT also contends that allowing AT&T to concentrate on large volume users would exclude smaller carriers from competing for those same customers, and that AT&T's proposed offering is tantamount to a tying arrangement. *Id.* at 2-3. Finally, TRT concludes that AT&T is a dominant carrier in the provision of international service and that the proposed transmittal will adversely affect competition in this arena. *Id. at 4.*

4. AT&T replies that TRT has not met the four-part test of Section 1.773(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(1)(ii), required to suspend the tariff of a non-dominant carrier. AT&T asserts that this is a non-dominant filing and that, therefore, TRT must bear the heightened burden of proof established in that rule section. AT&T Reply at 1-2. AT&T also denies that it is offering additional discounts which only benefit large volume users and argues that no tying arrangementsId. at 4.

5. The Common Carrier Bureau has reviewed Transmittal 1541 and the various pleadings. We conclude that no compelling argument has been presented that the proposed tariff revision is patently unlawful or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition filed by TRT Telecommunications Corporation against AT&T Communications, Tariff F.C.C. Nos. 7 and 9, Transmittal No. 1541, IS DENIED.

7. IT IS FURTHER ORDERED that the comments filed by Satellite Transmission and Reception Specialist Company ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Informal comments in support of TRT's petition were filed on behalf of Satellite Transmission and Reception Specialist Company (STARS) on April 4, 1989. Since these comments were filed well past the deadline for filing petitions established by Section 1.773(a)(2)(i) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(i), they are not considered in this Order.

[2] According to AT&T, this bill covers International MTS and International Capability for Megacom and World Connect Services.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-556

In re Application of

ROCKLEDGE RADIO, LTD. — File No. BPH-861104MB

BEN L. UMBERGER — File No. BPH-861105MB

SHAW ENTERPRISES, INC. — File No. BPH-861105ME

ROCKLEDGE BROADCASTING ASSOCIATES LIMITED PARTNERSHIP — File No. BPH-861105MF

Michael H. Kahn d/b/a ORION COMMUNICATIONS, LTD. — File No. BPH-861105MH

D.V.R. BROADCASTING (A GENERAL PARTNERSHIP) — File No. BPH-861105MK

For a Construction Permit for a New FM Station on Channel 274A at Rockledge, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1989; Released: June 26, 1989

By the Review Board: BLUMENTHAL and ESBENSEN; Chairman MARINO absent.

1. The Review Board has before it the "Joint Petition for Approval of Settlement Agreements and For Leave to Amend," filed April 18, 1989 ("Joint Petition"), and supplemented May 4, 1989, by the six remaining applicants in this proceeding. These applicants were examined at hearing under the standard comparative issue and Administrative Law Judge Edward J. Kuhlmann ultimately selected Michael H. Kahn d/b/a Orion Communications, Ltd. as the comparative winner. *Initial Decision* (*I. D.*), FCC 89D-14, released April 14, 1989. Now, in lieu of filing exceptions, the parties seek approval of an arrangement whereby D.V.R. Broadcasting (A General Partnership) ("D.V.R.") would merge with Rockledge Radio, Ltd. ("RRL"); D.V.R.'s application, as amended, would be granted; and the five other applications would be dismissed.[1]

2. By its terms, the Joint Petition requests the Board[2]:

> to simultaneously (a) approve the five settlement agreements attached hereto; (b) grant D.V.R. leave to amend its application in order to form a corporation effecting a merger between D.V.R. and RRL; (c) dismiss with prejudice the applications of RRL, Umberger, Shaw, RBA and Kahn; (d) grant D.V.R.'s captioned application (as amended); and (e) terminate this proceeding.

The Joint Petition further explains[3]:

> Taken together, the Agreements provide for the merger of D.V.R. and RRL into a new corporation in which each of D.V.R's and RRL's owners will have voting equity; the dismissal with prejudice of the applications of RRL, Umberger, Shaw, RBA and Kahn in exchange for consideration to be paid by D.V.R.; and the assumption by the new corporation of D.V.R.'s obligations to compensate Umberger, Shaw, RBA and Kahn for their dismissal.

3. Under the more specific terms of the Merger and Settlement Agreement between D.V.R. and RRL, executed April 13, 1989 (and appended to the Joint Petition), it is provided that[4]:

1. D.V.R. and RRL agree to merge their interests into a new Florida corporation to be known as Brevard Broadcasting Corp. ("BBC"), under the following terms and conditions:

> A. The authorized stock of the corporation will be divided into two classes of equal size, the holders of which will have identical rights except as set forth in the remaining provisions of this paragraph 1. The Class A stock will be distributed as follows:
>
> Valree Ann Peralta - 33 1/3%
>
> Douglas Leo Peralta - 33 1/3%
>
> Robert Thomas Rowland, Jr. - 33 1/3%

The Class B stock will be distributed as follows:

> Charles L. Sampson - 20%
>
> Richard H. Adams, Jr. - 47 1/2%
>
> Joe T. Caruso - 32 1/2%

4. Furthermore, the Merger and Settlement Agreement provides that[5]:

> The Class A stockholders will be solely responsible for obtaining a bank loan in the amount of the Settlement Cost and Construction Cost and for establishing the escrow account required under the Agreements. The bank loan, although procured by the Class A stockholders, will be the corporate obligation of BBC and will be secured by all of BBC's assets. The Class A stockholders will be responsible for providing and/or arranging for personal guarantees and any other security which the bank requires for the foregoing loan and all such security shall be fully released within three years of the date

> hereof. During the initial three-year period, the Class B stockholders shall not be required to guarantee any such loans, and thereafter no BBC stockholder shall be required to guarantee any loan to BBC. All interest on the bank loan will be considered an operating expense of BBC.

5. In examining the proposal before us, we must first review pertinent findings of fact and conclusions of law of the ALJ regarding RRL, one of the merging applicants. In his findings of fact (*I. D.*, paras. 13-25), the ALJ found that although RRL claimed to be a Florida "limited" partnership, with Charles L. Sampson (putatively a 25% equity owner) purported to be the sole "general" partner, and Joseph T. Caruso and Richard H. Adams, Jr. (each putatively 37.5% equity owners) as the two "limited" partners, RRL was not a *bona fide* limited partnership. He found, for example, that Sampson was recruited to the RRL application by Caruso, a local Florida attorney, but that Sampson knew very little about the RRL application (*id.*, paras, 16, 19-22, 24), its finances or the financial ability of the limited partners (*id.*, paras. 23, 25), and that – *mirabile dictu* – Sampson admitted to being a "figurehead" for another company seeking minority contracts at the Kennedy Space Center. *I. D.*, paras 17-18.[6]

6. In his conclusions, the ALJ found that Sampson's testimony about how he obtained financing was "incomprehensible and probably untrue" (*I. D.* at para 55); that his testimony about the partnership agreement was "generally evasive" (*id.*, at para 56); that his testimony was unreliable in other respects; and that "overall his untruthful testimony leads to the conclusion that he cannot be counted on to tell the truth about his role in the partnership" (*id.*, at para 60). In sum, the ALJ concluded that RRL was not entitled to any integration credit "because its principal Charles Sampson does not actually control the partnership and his testimony about his participation is unreliable and untruthful" (*Id.*, at para 89).

7. In view of the foregoing, it is apparent that there are two major obstacles to our approval of the proposed settlement agreement in its present form. The first pertains to the negative findings made by the ALJ regarding the truthfulness and reliability of Mr. Sampson, who is proposed as a 20% Class B stockholder in the merged entity, BBC. Because Construction Permits may only be awarded to fully qualified applicants, *see California Broadcasting Corp.*, 2 FCC Rcd 4175, 4193 (Rev. Bd. 1987), the question arises as to whether Sampson's inclusion in BBC precludes such a grant. In accordance with Commission precedent dating back to 1977 (*see Henderson Broadcasting Co.*, 63 FCC 2d 419 (Rev. Bd.)), the ALJ here treated the *bona fides* of RRL's integration proposal, and Sampson's testimonial description of it, as a matter of comparative rather than basic qualifications, and thus awarded the applicant no "integration" credit. *See Susan S. Mulkey*, 3 FCC Rcd 590 (Rev. Bd. 1988); *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987). Because "under current Commission precedent, even completely negativing the credibility or viability of an integration proposal cannot be equated with disqualifying the putative malfeasor," an appropriate disqualifying issue must first be designated and intentional deceit proven. *Id.* ; *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399 (1965) ("In the absence of a designated issue, character evidence will not be taken"); *Bellingham TV Assn., Ltd.*, 103 FCC 2d 222 (Rev. Bd. 1986) (undisclosed principal issue added); *Cascade Video of Oregon, Ltd.*, 99 FCC 2d 1001 (Rev. Bd. 1984) (mispresentation/lack of candor issue added). This principle was recently discussed at length in *Silver Star Communications*, 3 FCC Rcd 6342, 6349-6350 (Rev. Bd. 1988).

8. In the past, where the evidence taken on a non-character issue has collaterally raised misrepresentation and/or lack of candor issues, the Board has treated the organic (non-character) issue, but held that had the subject applicant *not* been eliminated, the Board would be compelled to remand the case under a truthfulness issue. *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989); *Dutchess Communications Corp.*, 101 FCC 2d 243 nn. 13, 31 (Rev. Bd. 1985); *Silver Star, supra*, 3 FCC Rcd at 6350. While the ALJ here made adverse findings about Sampson's honesty without properly adding the requisite character issue, we cannot disregard the ALJ's findings, for "[a]n initial decision is not a mere report to be arbitrarily disregarded. In the absence of review, the initial decision is the decision of the agency." *The Seven Hills Television Company*, FCC 89I-32, released May 1, 1989 at n. 3 (quoting *Stereo Broadcasters, Inc.*, 652 F.2d 1026, 1030 (D.C. Cir. 1981)). Here, and based on the record as reflected in the ALJ's findings and conclusions, we believe that the requisite *prima facie* case for issue enlargement, including the existence of a substantial and material question as to Mr. Sampson's veracity, would seem plainly established, particularly where these findings have not been challenged before the Board.

9. Having so concluded, and in the absence of exceptions to the ALJ's adverse findings, we could not now approve the proposed settlement which, as noted, incorporates RRL in the proposed grantee, without first remanding the proceeding on the issue delineated above. In this regard, however, we note that by its terms[7]:

> This agreement is entered into subject to approval by the Commission. Should the Commission decline to approve any provision of this Agreement, the parties agree to proceed in good faith to resolve any Commission objections so as to secure approval of an agreement which most nearly reflects the original intentions of the parties as reflected herein.

Recognizing the parties' intentions, we point out that we have previously rejected agreements without prejudice to subsequent resubmission after reformation to remove objectionable features. *See Marr Broadcasting Co., Inc.*, 3 FCC Rcd 562 (Rev. Bd. 1988) (principals disqualified for misrepresentation eliminated from ownership interest in revised agreement which is then approved); *Nirvana Radio Broadcasting Corp.*, FCC 89R-25, released April 21, 1989 (Rev. Bd.) (agreement approved subject to modification of provision containing convenant not to compete). And, the parties' attention is particularly directed to *Kannapolis Television Co., A Joint Venture*, 3 FCC Rcd 2676 (1988), where the Commission reversed its earlier denial of a settlement agreement after withdrawal of the principal whose adjudicated misconduct under a character issue had previously rendered the proposed grantee unqualified to be a licensee. Here, RRL has not yet been disqualified, but the *I. D.* 's findings – thus far unchallenged – make it impossible for the Board to regard the RRL principals as truthful with the Commission, or qualified to assume licenseeship. *See Character Policy Statement*, 102 FCC 2d

1179, 1209-1211 ("truthfulness is one of the two key elements of character necessary to operate a broadcast station").

10. A second feature of the Merger and Settlement Agreement that prevents its approval at this stage is the provision set forth at para. 4, *supra*, calling for the Class A stockholders to obtain a bank loan to meet the settlement and construction costs and to establish the escrow account. The sums involved, estimated by the parties to range from $730,000 to $880,000, depending on whether an additional loan for construction and operation is required[8], are not insubstantial. While the parties are correct that no basic qualifying issues are outstanding against D.V.R. or RRL,[9] the proposed merger would create a new corporation whose financial qualifications have not been reviewed, and the bulk of that new entity's financial obligations would be in the form of the newly acquired settlement costs. Both the Board and the Commission have required applicants to supplement their financial showings in appropriate cases, *see, e.g., Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *remanded*, 4 FCC Rcd 1215 (1989), and we believe the changed circumstances presented by the proposed merger warrant such treatment here. Thus, we could not approve the present arrangement in the absence of a financial showing; and should the parties submit a modified agreement in the future (pursuant to paras. 7-9, *supra)* containing the same financing provisions discussed herein, said agreement must provide reasonable assurance that the bank loan(s) relied on for funding will be available. Specifically, there should be documentation from the financial institution indicating its willingness to provide such loans, and showing the specific amount, the terms of repayment, and the interest rate.

11. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreements and For Leave to Amend, filed April 18, 1989, as supplemented May 4, 1989, by the applicants herein IS DISMISSED.

12. IT IS FURTHER ORDERED, That the applicants herein ARE DIRECTED to file, within 30 days of the release date of this *Order*, either a modified settlement agreement (and supporting materials); or any exceptions to the *Initial Decision*.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Joint Petition at 2.

[2] *Id.*, at 1-2.

[3] *Id.*, at 2-3.

[4] Merger And Settlement Agreement at 3.

[5] *Id.*, at 5.

[6] There the I.D. reports (emphasis added):

17. Mr. Sampson had earlier established a company called Classic Management Services, Inc. RRL Exh. 2. He owns 50% of that company which was created to bid on minority contracts at the Kennedy Space Center. Tr. 84. The purpose again was to use his minority status to obtain contracts. Id. The company has not made any bids yet but Mr. Sampson hopes that it will because it is lucrative. Tr. 89. Moreover, it involves no effort on Mr. Sampson's part since, as he explained, in order to bid, the company does not have to have any assets. The government provides all the equipment and facilities and the work is performed at the Kennedy Space Center. Tr. 90-91. *When asked if he was just a figurehead to obtain the contracts, he answered yes.* Tr. 84, 91.

18. When it was suggested to Mr. Sampson that he had no apparent knowledge about the broadcasting business, he concocted a story about his knowledge of broadcasting. He explained that, in 1985, he began a limousine service, which he helped run for about six months. Tr. 82-83. During that time he claimed he provided limousine service to some of the local radio stations which resulted in his sitting around and talking with the stations' DJs. Tr. 92. The only other knowledge Mr. Sampson has about broadcasting was acquired when he was 10 or 11 and he visited a radio station where his sister's boyfriend was a DJ. Tr. 91. He currently maintains and takes care of storing documents at the Kennedy Space Center. Tr. 80-81. He is employed by Bamsey, a Lockhead minority subcontractor. *Id.*

[7] Merger and Settlement Agreement at 8.

[8] *Id.*, at 4-5.

[9] Joint Petition at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC. *et al.* — File No. BPH-850712GV *et al.*

For Construction Permit
for a New FM Station in
Bay Shore, New York
Channel 276A

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1989; Released: June 16, 1989

By the Commission:

1. Each of the applicants in this proceeding certified that it had reasonable assurance of availability of the Fire Island Lighthouse as an antenna site. The Lighthouse is managed by the National Parks Service (NPS). On August 10, 1983, Long Island Music Broadcasting Corporation (LIMBC) obtained a commitment from the NPS for a lease of the Lighthouse for use as a radio station. On November 7, 1985, LIMBC filed a Request for Declaratory Ruling. LIMBC asked for a determination concerning whether the other applicants had reasonable assurance of site availability, arguing that it had an exclusive arrangement with the NPS. The Mass Media Bureau, relying *inter alia* on a letter dated November 27, 1985 from the NPS, found that LIMBC's agreement with the NPS was conditioned upon the applicant securing an FM license and that the NPS was prepared to initiate a new competitive proceeding for use of the Lighthouse if LIMBC's application were denied. Therefore, the Bureau denied LIMBC's Request and designated this proceeding for hearing. *Warren Price Communications, Inc.*, 2 FCC Rcd 4201, 4202 ¶ 4 (Mass Med. Bur. 1987).

2. During the course of the proceeding, the ALJ found various procedural deficiencies in the prosecution of LIMBC's application. Based on those procedural deficiencies, the ALJ dismissed LIMBC's application. *Warren Price Communications, Inc.*, FCC 87M-2552 (ALJ Oct. 13, 1987), *aff'd* 2 FCC Rcd 7409 (Rev. Bd. 1987). On appeal, the Commission found that the ALJ had acted within his discretion, and it sustained the dismissal of LIMBC's application. *Warren Price Communications*, FCC 89-58 (Feb. 27, 1989). On March 27, 1989, LIMBC filed a Petition for Reconsideration requesting reconsideration of the dismissal of its application.

3. Also before the Commission for consideration are a Petition to Dismiss[1] filed March 27, 1989, a Petition for Stay[2] filed April 7, 1989, a request for an investigation filed April 17, 1989 and an Application for Review filed May 23, 1989 by LIMBC. The Petition to Dismiss raises a serious question concerning whether the applications filed by each of the other applicants should be dismissed for lack of reasonable assurance of availability of their proposed antenna site. In view of the questions raised by the Petition to Dismiss and the need for expedition, we will defer consideration of LIMBC's Petition for Reconsideration, its request for investigation and its Application for Review. Those pleadings will be considered in a subsequent order.

4. *The Petition to Dismiss:* LIMBC asserts that on February 15, 1989, NPS entered into an exclusive 15 year lease with LIMBC for use of the Lighthouse as a transmitter site. The lease grants LIMBC "the exclusive right to operate commercial radio service from the site." Lease p. 3, ¶ 3. In this connection, LIMBC submitted a newspaper article indicating that it will also use the Lighthouse "as a transmission link for a satellite radio network daily television service" to cruise ships. Response to Warren Price Communications, Inc.'s Opposition to Petition for Stay, filed May 1, 1989 by LIMBC, Exh. 1. LIMBC argues that in light of its exclusive lease with the NPS, the other applications should be dismissed for lack of reasonable assurance of site availability.

5. The oppositions argue that the Petition to Dismiss is untimely and thus procedurally deficient either as a petition for reconsideration of an interlocutory order or as an appeal of the *HDO*. 47 C.F.R. §§ 1.106 and 1.115(e)(3). They assert that the arguments concerning their reasonable assurance of site availability were resolved in the *HDO*. They also argue that LIMBC's application was dismissed, that it lacks standing to file the instant petition, and that LIMBC's efforts to prevent other applicants from specifying the Lighthouse violates 47 C.F.R. § 73.239.

6. The *HDO* concluded that all the applicants had reasonable assurance of site availability on the strength of the November 27, 1985 letter from the NPS, indicating that it would institute a new proceeding to select another lessee for the Lighthouse if LIMBC were not granted a license. *HDO* at ¶ 4. Notwithstanding this representation, NPS thereafter granted LIMBC a lease before LIMBC was granted a license. The grant of the lease undermines the premise of the *HDO* and, irrespective of the findings in the *HDO* and LIMBC's status in this proceeding, raises serious questions concerning whether the applicants continue to have reasonable assurance of site availability.

7. Nor do we agree with the applicants that the lease violates Section 73.239 of the Rules. That Section provides:

> No FM broadcast station license . . . will be granted to any person who owns, leases or controls a particular site which is peculiarly suitable for FM broadcasting in a particular area and (a) which is not available for use by other FM station licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant would unduly limit the number of FM broadcast stations that can be authorized in a particular area or would unduly restrict competition among FM broadcast stations.

Section 73.329 prohibits FM licensees from preventing other licensees from using their antenna sites. At this juncture, LIMBC's application has been dismissed, it is

not currently eligible to be granted a license, and thus it appears that the rule has no present applicability to LIMBC. However, even if LIMBC is granted a license, the applicants have not shown how LIMBC's NPS lease will prevent access by "other FM licensees," limit "the number of FM broadcast stations that can be authorized . . . or would unduly restrict competition among FM broadcast stations."

8. In view of the questions raised concerning reasonable assurance of site availability, we are directing the remaining applicants and the Mass Media Bureau to file comments on the effect of the LIMBC lease on their reasonable assurance, as well as on the possibility of other "equally creative ideas in obtaining a transmitter site in this area." *FM Channel Assignments*, 57 RR 2d 1275, 1279 ¶ 18 (1985).

9. *The Petition for Stay:* The ALJ is scheduled to commence further hearings in this proceeding on June 19, 1989. Given the questions raised above, it appears that it would be premature to expend the resources of the parties and the Commission in this manner. Thus, without regard to the merits of LIMBC's request for stay, we will stay the hearing pending further action by this Commission.

10. ACCORDINGLY, IT IS ORDERED, That the remaining Applicants and the Mass Media Bureau ARE DIRECTED to file Comments as discussed in paragraph 6 above within 15 days from the release date of this Memorandum Opinion and Order, and that the parties MAY FILE Reply Comments within 5 days thereafter.

11. IT IS FURTHER ORDERED, That the Petition for Stay filed April 7, 1989 by Long Island Broadcast Music, Inc. IS GRANTED to the extent indicated herein, and the hearing in this proceeding IS STAYED pending further action by this Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Oppositions were filed April 6, 1989 by Warren Price Communications, Inc., April 11, 1989 by South Shore Media Corporation, April 20, 1989 by Bay Shore Community Broadcast Associates, Ltd., April 24, 1989 by Susan Lundborg, April 28, 1989 by Fire Island Broadcasting, May 1, 1989 by RPS Communications, and May 4, 1989 by Kandel Broadcasting Corporation. LIMBC filed Replies on April 19 and 24, and May 1, and 9, 1989. LIMBC in its May 1, 1989 Reply argues that Bay Shore Community's April 20, 1989 Opposition is untimely. Bay Shore Community filed an Opposition on May 4, 1989 arguing that LIMBC's argument concerning the timeliness of its April 20 pleading is without merit. As reflected below, the timeliness of Bay Shore Community's pleading is not a critical factor for our action in this Memorandum Opinion and Order.

[2] Oppositions were filed April 13, 1989 by Warren Price Communications, Inc., May 1, 1989 by RPS Communications, May 2, 1989 by Bay Shore Community Broadcast Associates, Ltd., and May 4, 1989 by Kandel Broadcasting Corporation. LIMBC filed a Response on May 1, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-79

In the Matter of

Amendments of Part 69 of the
Commission's Rules Relating to
the Creation of Access Charge
Subelements for Open Network
Architecture

ORDER

Adopted: June 13, 1989; Released: June 15, 1989

By the Chief, Common Carrier Bureau:

1. On May 31, 1989, the parties listed in Appendix A (Joint Parties) filed a motion requesting that the time for filing comments and reply comments in the above-captioned proceeding be extended from June 26 and July 26, 1989, respectively, to September 12 and October 27, 1989, respectively. The United States Telephone Association (USTA), the Bell Atlantic Telephone Companies (Bell Atlantic) and Southwestern Bell Telephone Company (SWBT) filed oppositions to the motion.

2. The Joint Parties state that this proceeding involves broad questions of policy affecting Open Network Architecture (ONA), enhanced service providers and the "future of on-line information services in the United States."[1] They also state that the Notice of Proposed Rule Making in this proceeding[2] makes a number of requests for detailed information.[3] They contend that to respond adequately, interested parties must undertake time consuming special studies.[4]

3. The Joint Parties also argue that an overlap exists among the pleading cycles of the instant proceeding and two other major Commission initiatives, the "price cap" proceeding[5], and the proceeding on the ONA Plan amendments,[6] creating a major practical problem for the Joint Parties, "almost all of which have very small or nonexistent regulatory staffs and limited resources to devote to outside counsel."[7] They observe that price cap comments are due on June 19, and replies on July 19, 1989 and that comments on the ONA Plan amendments are due on July 12, and replies on August 11, 1989.[8] The Joint Parties argue that it would be "logical and desirable" for the parties to address price cap issues first, and to "set the stage" for ONA by addressing the ONA Plan amendments and having pending ONA petitions for reconsideration decided before addressing the ONA pricing issues raised in the instant proceeding.[9] They therefore ask that the pleading cycles in price caps and on the ONA Plan amendments be completed before the pleading cycle in the instant proceeding is begun.[10]

4. The Joint Parties also state that the requested extension would permit enhanced service providers and other users to engage in a dialogue with the BOCs and other local exchange carriers before formal comments are submitted.[11] They observe that the pleading cycles in the instant proceeding and in the price cap Rule Making and on the ONA Plan amendments span the summer months when key personnel may be on leave.[12] They note that three new appointments to the Commission are expected, so that it is unlikely that the requested extension will significantly delay the Commission's ability to decide the issues presented in the Notice.[13] They also seek a longer reply period than that contemplated in the Notice, given the importance of the issues, the large number of parties that are likely to participate and the desirability of having adequate time to address conflicting comments, data and analyses.[14]

5. In opposition, USTA, Bell Atlantic and SWBT claim that the length of time requested for the extension is excessive: some two-and-a-half months for comments and some three months for replies, amounting to a time span of nearly seven months from the adoption of the item until reply comments would be due and about four months from release of the item until comments would be due.[15] Bell Atlantic states that the requested extension would unduly delay ONA implementation and that this Commission should not condone such dilatory tactics.[16] USTA states that the fact that the instant proceeding involves broad policy issues and requires detailed informational submissions does not distinguish it from any other proceeding.[17] SWBT states that the Joint Motion offers no basis for the claim that any special studies required in response to the Notice will take more time than the Notice allots.[18]

6. USTA and SWBT state that the instant Rule Making was intended to parallel the ONA proceeding, so as not to stall ONA implementation.[19] Bell Atlantic states that parties may reasonably coordinate their comments in the instant proceeding with price caps and that the issues arising from the ONA Plan amendments are separate and distinct from the access charge issues at issue in the instant Rule Making.[20] USTA states that there is no compelling reason why comments filed in the other two proceedings will demand any change in the direction of the instant docket and that when the issues in these proceedings are decided, an alignment of ONA rate-related issues and the final price cap baskets can occur without difficulty.[21] USTA states that the fact that the staff of the Joint Parties must cope with overlapping deadlines is not a persuasive ground for an extension, because both the BOCs' staff and that of the Commission experience similar constraints.[22] Bell Atlantic notes in this regard that most of the Joint Parties are represented by large law firms with sufficient resources to deal with concurrent proceedings.[23]

7. USTA adds that an extension of time is not needed to encourage further industry dialogue because ongoing discussion has occurred in the ONA arena and because the existence of a completed record is more likely to make such discussions fruitful.[24] USTA adds that the Commission's schedule should not be altered to accommodate the vacation schedules of parties that appear before it. USTA states that an extension would only delay the time when any new commissioners could begin to address the issues in this proceeding. Moreover, USTA and SWBT argue an extension could create new conflicts with other major proceedings, including development of the next annual access tariff filings.[25]

8. We grant partial relief to the Joint Parties, by extending the due date for the filing of initial comments to August 10, 1989, and the due date for reply comments to September 11, 1989. We appreciate the Joint Parties' concern over providing valuable input in response to the Notice. We agree that some modification to the existing schedule would facilitate the formulation of the meaningful comments that a proceeding of this nature demands. However, we agree with the opposing parties' contention that the full extension of time which the Joint Parties request – a 78-day extension from the June 26 date originally set for comments, with replies following 45 days later, is unnecessary.[26] We believe that the revised pleading cycle provides the parties a reasonable period of time to comment and respond.[27] We encourage the Joint Parties to engage in dialogue with other interested participants in this proceeding, and believe, particularly with the extension as granted, that they will have sufficient time to initiate or continue such discussions. As we have previously stated, good cause for an extension of time generally is not demonstrated by the fact that counsel or parties are engaged in other proceedings or have planned vacations.[28] However, we observe that the revised dates allow for completion of the price caps pleading cycle before initial comments are due in the instant proceeding, that these initial comments are not due until more than three weeks after initial comments are filed on the ONA Plan amendments and that replies in this proceeding are due over three weeks after the ONA Plan amendment cycle will have closed. Finally, we decline to speculate on what effect, if any, new Commission appointments may have on the revised scheduling in this docket.

9. IT IS THEREFORE ORDERED that the Joint Motion for Extension of Time filed by the Joint Parties IS DENIED IN PART AND GRANTED IN PART, and that the time for filing initial comments in the instant proceeding IS hereby EXTENDED to August 10, 1989, and the time for filing reply comments IS hereby EXTENDED to September 11, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

The "Joint Parties" consist of the following:

ADAPSO

ADT Security Systems, Inc.

Aeronautical Radio, Inc.

Alarm Industry Communications Committee

American Petroleum Institute

Association of Telemessaging Services, Inc.

Automatic Data Processing, Inc.

Boeing Computer Services

California Bankers Clearing House Association, Mastercard International Incorporated, New York Clearing House Association, VISA, U.S.A., Inc., and Committee of Corporate Telecommunications Users

Coalition of Open Network Architecture Parties

CompuServe, Inc.

Computer and Business Equipment Manufacturers Association

Dialcom, Inc.

Dow Jones and Company, Inc.

Dun & Bradstreet Corporation

Electronic Data Systems Corporation

Electronic Mail Association

General Electric Communications and Services

Independent Data Communications Manufacturers Association, Inc.

Information Industry Association

International Communications Association

McGraw-Hill, Inc.

MCI Telecommunications Corporation

Motorola

National Data Corporation

National Retail Merchants Association

Prodigy Services Company

Quantum Computer Services, Inc.

Tele-Communications Association

Telenet Communications Corporation

Tymnet-MCDonnell Douglas Network Systems Company

Utilities Telecommunications Council

Videotex Industry Association, Inc.

Xerox

FOOTNOTES

[1] Joint Motion for Extension of Time of the Joint Parties, filed May 31, 1989, at 1-2 (Joint Motion).

[2] Notice of Proposed Rule Making, 4 FCC Rcd 3983 (1989) (Notice).

[3] Joint Motion at 2.

[4] *Id. at 3.*

[5] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989).

[6] *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 17 (1989) (*BOC ONA Order);* Public Notice, Pleading Cycle Established for Comments on Amendments to BOC ONA Plans, DA 89-557 (released May 19, 1989).

[7] Joint Motion at 4.

[8] *Id.* at 4.

[9] *Id.* at 5-6.

[10] *Id.* at 6.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 7.

[14] *Id.* at 7.

[15] Opposition to Joint Motion for Extension of Time of USTA (dated June 7, 1989) (USTA Opposition), at 1-2; Opposition to Joint Motion for Extension of Time of Bell Atlantic (dated June 7, 1989)(Bell Atlantic Opposition), at 1,4; Southwestern Bell Telephone Company's Opposition to Joint Motion for Extension of Time (dated June 9, 1989) (SWBT Opposition), at 1-2.

[16] Bell Atlantic Opposition at 1.

[17] USTA Opposition at 2.

[18] SWBT Opposition at 2.

[19] USTA Opposition at 2-3; SWBT Opposition at 2-3.

[20] Bell Atlantic Opposition at 2-3. Bell Atlantic notes that it is rare that the Commission does not have before it a decision which may impact another proceeding. *Id.* at 3 n.3.

[21] USTA Opposition at 4. *See also* SWBT Opposition at 3.

[22] USTA Opposition at 3.

[23] Bell Atlantic Opposition at 2 & n.2.

[24] USTA Opposition at 4.

[25] *Id.* at 4-5; SWBT Opposition at 3. *See also* Bell Atlantic Opposition at 2, 3.

[26] We note in this regard that the Commission adopted the Notice in this docket on March 30, 1989. *See* FCC News Release, Action in Docket Case, "Methods for Integrating ONA Tariffing Policies and Access Rules Proposed", CC Docket 89-79, Report No. DC-1384, Mimeo No.2222, released Mar. 30, 1989. The full text of the Notice was released on May 9, 1989. We also observe that as of December, 1988, with the adoption of the *BOC ONA Order*, parties were on notice that the instant proceeding would commence shortly and also had notice of the basic questions it would address. *See generally BOC ONA Order,* 4 FCC Rcd at 143-47.

[27] *See* 47 C.F.R. § 1.415.

[28] Policy and Rules Concerning Rates for Dominant Carriers, 2 FCC Rcd 6489 (Com. Car. Bur.1987); Public Notice, Motions for Extension of Time Before the Common Carrier Bureau, 44 Rad. Reg. 2d (P&F) 96 (Com. Car. Bur. 1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-526

In re Applications of

WILLIAM M. PINER — File No. BPH-860604ML

RO NITA BERNICE HAWES-SAUNDERS — File No. BPH-860606MI

For Construction Permit for a new FM Station on Channel 221A in West Carrollton, Ohio

Appearances

John B. Kenkel, on behalf of William M. Piner; *Richard L. Bodorff*, *Clifford M. Harrington*, *Jonathan W. Emord*, and *Scott R. Flick*, on behalf of Ro Nita Bernice Hawes-Saunders.

DECISION

Adopted: June 16, 1989; Released: June 27, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

Board Chairman MARINO:

1. This comparative hearing involves the competing applications of William M. Piner (Piner) and Ro Nita Bernice Hawes-Saunders (Hawes-Saunders) for authority to construct and operate a new commercial FM broadcast station on Channel 221A at West Carrollton, Ohio. Following a trial-type hearing, presiding Administrative Law Judge John M. Frysiak (ALJ) issued an *Initial Decision*, 3 FCC Rcd 7101 (1988) (*I. D.*), in which he granted the Hawes-Saunders application after concluding that that applicant was comparatively superior to Piner. Exceptions, and contingent exceptions, to the *I. D.* have been filed by Piner and Hawes-Saunders, respectively, and both parties have filed replies. Based on our review of the *I. D.*, and in light of the exceptions and briefs, the Board has determined that oral argument would not assist in the resolution of the case. We adopt the ALJ's findings of fact and conclusions of law, and affirm his ultimate conclusion that grant of Hawes-Saunders' application would better conform to current licensing policy.

2. As noted above, the *I. D.* turns solely on the comparative analysis. In this regard, the proposals of the two remaining applicants are so nearly equal that the ALJ concluded that the only decisionally significant differences are that Hawes-Saunders proposes the full-time integration of its female 100% owner as general manager, while Piner's proposal lacks female integration, and that Hawes-Saunders has a slightly weightier credit for civic participation. As for their overall comparative proposals, Piner and Hawes-Saunders are both sole proprietors, each seeking 100% quantitative fulltime "integration" credit as managing owners, enhanced qualitatively by long-time residence in the proposed service area, and by extensive service area civic activities. Additionally, each has broadcast managerial experience. Neither applicant has any other media interests, and both plan to install an auxiliary power source. But Piner is a black male and Hawes-Saunders a black female.

3. In his exceptions, Piner argues that the ALJ erred in awarding Hawes-Saunders a female preference, citing *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), where, Piner argues, the presiding panel held that such preferences are beyond the Commission's authority. Piner claims that "Congress has [also] spoken . . . that consideration of such [a] preference . . . should not be entertained by the FCC," citing House Joint Resolution 395, *Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202, signed December 22, 1987, which contains the appropriations legislation for the Commission for fiscal year 1988. Piner Br. at 3. Piner further argues that the ALJ erred in awarding superior weight to Hawes-Saunders' civic activities.

4. We discern no error on the part of the ALJ. The panel decision in *Steele*, upon which he relies primarily, was *vacated* by the Court *en banc*, which simultaneously ordered a rehearing of the case. *See Order*, No. 84-1176 (D.C. Cir. Oct. 31, 1985). Thereafter, and pursuant to a motion by the Commission before *Steele* could be reheard, the court remanded the proceeding to the Commission to allow it to reexamine the bases for its minority, ethnic, and female preferences. *See Order*, No. 84-1176 (D.C. Cir. Oct. 9, 1986). In so doing, the court stated that the *"en banc* court has not considered, and therefore expresses no position on [the constitutionality of the racial and gender preferences]." On remand, the Commission initiated the pertinent notice of inquiry proceeding. *Notice of Inquiry re Reexamination of the Commission's Comparative Licensing, etal. Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484) (hereinafter referred to as *"Race and Gender Preferences"*). That inquiry was aborted, however, after President Reagan signed into law the 1988 FCC appropriations legislation cited by Piner, above. *See Order re Race and Gender Preferences*, 3 FCC Rcd 766 (1988). That legislation contained the following provison:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d [1301] (1982) [sic] and *Mid - Florida Television Corp.*, [69] F.C.C. 2d 607 Rev. Bd. (1978) [sic], which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

3 FCC Rcd at 766 (quoting the 1988 legislation). In compliance with the above proviso, the Commission ordered the ALJs, the Review Board, and Office of the General Counsel to process all comparative licensing cases in a manner consistent with the Commission's policy in effect prior to September 12, 1986. Thereafter, the Commission reaffirmed the underlying Review Board *Decision, namely, Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, *recon. denied*, 94 FCC 2d 72 (Rev. Bd. 1972)), that gave rise to *Steele* in the first instance. *Cannon's Point*, hence *Steele*, turned dispositively on the female preference awarded to the winning applicant. *See* 3 FCC Rcd 864 (Comm'n 1988). Piner, thus, is mistaken as to the current state of female preferences; in these precincts, the female preference prevails.

5. Similarly, Piner has not undermined the ALJ's analysis concerning the parties' past participation in civic activities. Credit for past civic participation in the community of license (or proposed service areas) is awarded to deserving applicants "predicated on the view that such participation has instilled useful knowledge of the community's needs and interests in the involved station principal and that this involvement betokens an interest in the welfare of the community." *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984), *review denied*, 100 FCC 2d 941 (1985); *see also Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Here, a review of the detailed findings contained in the I.D. (at paras. 8-11, 22-26) reflects that Hawes-Saunders' civic activities are significantly more extensive and recent in time than those of Piner's (where most occurred more than 10 years ago). Hence, a preference here to Hawes-Saunders. *Cf. Radio Jonesboro, Inc.*, 96 FCC 2d at 1109-1110 (activities remote in time warrant reduced credit).

6. Because we find Hawes-Saunders must receive a gender preference, and is superior on local civic activities, we need not reach her contingent exceptions on the ALJ's equal division of credit for past broadcast experience.

SUMMATION

7. Piner and Hawes-Saunders are both entitled to 100% quantitative "integration" credit for ownership management, enhanced qualitatively by long-term residence in the proposed service area and civic activities. Both also have broadcast managerial experience. Both are minorities, though Hawes-Saunders is a female. Neither has other media interests, and both propose an auxiliary power source. Whereas the applicants are nearly evenly matched, Hawes-Saunders prevails based on her female enhancement, *Cannon's Point, supra* and superiority in civic affairs participation. Without decisional error, the *I.D.* is affirmed.

8. ACCORDINGLY, IT IS ORDERED, That the application of Ro Nita Bernice Hawes-Saunders (File No. BPH-860606MI) for a new FM broadcast station at West Carrollton, Ohio IS GRANTED; and that the application of William M. Piner (File No. BPH-860604ML) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-281

In the Matter of

Nighttime Operations on Canadian,
Mexican, and Bahamian Clear Channels

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1989; Released: June 26, 1989

By the Commission:

1. On April 6, 1988, the Commission adopted its *Second Report and Order* (*"Second Report"*) in the above-captioned proceeding,[1] affirming its rules governing the authorization of new AM stations on Canadian, Mexican and Bahamian clear channels. In the *Second Report*, the Commission determined that it would use only technical, rather than non-technical, criteria in accepting applications for full-time use of the newly available Class I-A foreign clear channels. Specifically, the Commission declined to adopt two proposed non-technical acceptance criteria: (1) "service-based" criteria for new stations designed to serve an unserved or underserved area; or (2) "ownership-based" criteria for minority or noncommercial applicants.

2. Currently before the Commission is a petition requesting reconsideration of this decision filed by the National Black Media Coalition ("NBMC") and comments filed by National Public Radio ("NPR") in response thereto. The petition generally raises two issues. First, NBMC argues that reconsideration is warranted because the Commission's own studies regarding opportunities for new service on foreign clear channels are inaccurate. Second, assuming reconsideration of the *Second Report* is warranted, NBMC claims that the Commission should adopt NBMC's experimental proposal for determining the use of foreign clear channels. The arguments of the parties and the Commission's decision on these issues are discussed in detail below.

3. In 1984, the Commission adopted the initial *Notice of Proposed Rule Making* (*"Notice"*)[2] in this proceeding to consider amending its rules to permit nighttime broadcasting by U.S. radio licensees on the 14 frequencies designated as Canadian, Mexican and Bahamian Class I-A clear channels. For many years, international agreements had precluded nighttime use of these channels in large parts of the United States. In 1984, however, new and prospective international agreements made it possible to use these frequencies more extensively at night. As a result, the Commission adopted the *Notice* to seek comment on the most effective use of this newly available spectrum. The Commission also proposed rules similar to the existing rules governing the 25 U.S. Class I-A clear channels, which required applicants to meet both technical and non-technical acceptance criteria. The *Notice* specifically proposed that applications could be accepted for filing if they were designed to serve unserved or underserved areas or communities, *i.e.*, service-based criteria. Alternatively, for proposed stations in areas that were already served, the Commission would only accept applications filed by minorities or noncommercial entities who met the ownership-based criteria. Under either of these non-technical standards, however, full compliance with applicable interference standards would be required.

4. In order to determine the pattern of use of these foreign clear channels and the degree to which they might be available for the establishment of new full-time stations, the Commission conducted a number of intensive and wide ranging studies. These studies, *inter alia*, indicated that the majority of opportunities to establish new stations on the foreign channels would occur in unserved or underserved areas. Based on these studies, the Commission concluded in its initial *Report and Order* (*"Report"*)[3] in this proceeding that there was no need to impose service-based criteria to encourage filings in unserved or underserved areas, but that applicants should merely be required to meet technical criteria concerning interference. Further, because the Commission was not adopting the service-based criteria, it concluded that it was unnecessary to adopt the proposed ownership-based criteria, which were designed strictly as an exception to the service-based criteria. In so doing, the Commission emphasized that the frequencies at issue would be available to minority and noncommercial applicants without the proposed non-technical acceptance criteria.

5. NBMC sought judicial review of this *Report* on the grounds that the Commission had improperly declined to adopt the special provisions for minority and noncommercial applicants and that there were procedural defects in the Commission's action. Specifically, NBMC asserted that the Commission's decision differed from that proposed in the *Notice* and was based on studies that had not been made available for public comment. The court agreed that the Commission's action was procedurally flawed and remanded the matter to the Commission.[4]

6. Pursuant to the court's remand, the Commission issued a *Further Notice of Proposed Rule Making* (*"Further Notice"*)[5] in this proceeding in July 1987. The *Further Notice* invited comment on the Commission's proposal to accept new applications for use of the foreign clear channels solely on the basis of technical criteria, *i.e.*, interference standards. In addition, the Commission conducted new, more extensive studies regarding the pattern of use of the foreign clear channels at issue. These new studies, attached to the *Further Notice*, provided further support for the Commission's earlier conclusion that any opportunities to establish new full-time stations on the available frequencies were limited.

7. In response to the *Further Notice*, the Commission received comments from several parties. NPR and the Corporation for Public Broadcasting ("CPB") both argued that public broadcasters and minority applicants deserve special encouragement in frequency allocation, which could be provided through the use of non-technical acceptance criteria. NPR also questioned the methodology and accuracy of the Commission's new studies, particularly with respect to the maps that formed the basis for the Commission's determinations regarding available opportunities. In addition, CPB submitted a list of markets

not identified by the Commission's studies where, purportedly, there was no public radio service and new stations could be established on the frequencies at issue.

8. In contrast, the National Association of Broadcasters ("NAB") and the Association of Broadcast Engineering Standards ("ABES") asserted that the adoption of non-technical criteria would inhibit the most efficient use of the available spectrum by discouraging new service in areas where it might otherwise be established. ABES stressed that the Commission's new studies completely supported its conclusion that opportunities for new full-time stations on foreign clear channels would be minimal. Given such limited opportunities, these parties argued that the imposition of non-technical criteria would effectively eliminate all applicants other than minorities and noncommercial broadcasters.

9. In its reply comments,[6] NBMC set forth a new proposal for the use of the foreign clear channels. Specifically, NBMC suggested a one-year, experimental approach whereby any qualified party could file an application for a full-time station. Under this plan, any application would be put on public notice for a 30-day period, during which time only a minority or noncommercial applicant could file a mutually exclusive application. If, after 30 days, no competing applications were filed, a second 30-day period would be established during which any qualified applicant could file a competing application.

10. After thoroughly reviewing the record and comments filed in this proceeding, the Commission's *Second Report* declined to adopt non-technical criteria to govern the acceptance of applications for the use of the foreign clear channels. Based on its own engineering studies, the Commission determined that only limited opportunities existed for the establishment of new stations on these channels and that the comments did not undermine this conclusion. The Commission concluded that the vast majority of the newly created opportunities would exist in areas with limited or no service, so that there was no compelling reason to impose service-based acceptance criteria to encourage applications for such areas. The Commission also based its decision on the reasons given for its deletion of non-technical criteria for domestic clear channels in MM Docket 85-39.[7]

11. With respect to NPR's arguments regarding the accuracy of the Commission's engineering studies, the Commission first noted that its studies were designed to serve as a rough guide in identifying potential areas for new stations, not to establish conclusively where all new stations could be located. In addition, the Commission disagreed with CPB regarding the possibility of establishing full-time stations in the markets listed in CPB's comments. Instead, the Commission's own studies indicated that, for various technical reasons, it would not be possible to locate a new station in the majority of those markets.

12. Furthermore, the Commission stood by its earlier decision not to impose ownership-based criteria because these criteria were intended as exceptions to the service-based criteria. Given that the service-based criteria were not adopted, there was no need to provide alternative bases for accepting applications based on the nature of the applicant. In addition, the Commission determined that, for reasons similar to those that led to elimination of minority and noncommercial ownership criteria for the domestic clear channels, such acceptance criteria would not serve their intended purposes. Noting that the opportunities for using the frequencies at issue were extremely limited, the Commission found that such criteria would not increase minority and noncommercial ownership in a meaningful way. The Commission pointed out that noncommercial and minority applicants would still be able to apply for the newly available frequencies in any of the few urban areas where a new station could be located or in any unserved and underserved areas.[8]

13. With respect to NBMC's specific proposal to create a 30-day window for minority and noncommercial applicants once a qualified applicant has filed for one of the available frequencies, the Commission found that the proposal went beyond the scope of the current proceeding. The Commission noted that because the proposal was first presented in reply comments, other interested parties never had an opportunity to consider or comment on the novel procedure in the context of this proceeding. Furthermore, the Commission determined that NBMC's proposal appeared to be generally designed for applications for any radio and television service and thus might be more appropriate for consideration in the context of a general review of the Commission's rules, especially since the proposal appeared to raise important public policy and constitutional issues.

14. On July 8, 1988, NBMC filed the petition for reconsideration here under review. The petition urges the Commission to reconsider its decision in the *Second Report* to decline to adopt non-technical acceptance criteria for the newly available frequencies at issue. Specifically, NBMC argues that the Commission's conclusion regarding opportunities for new service on the foreign clear channels was erroneous, based on NBMC's own review of 12 of the 14 foreign clear channels west of the Mississippi[9] and the Commission's own analysis of CPB's list of markets in the *Second Report*.[10] In light of these purported opportunities for new service on the foreign clear channels in attractive, competitive communities, NBMC believes that minorities and public broadcasters need and deserve a special opportunity to be considered without facing comparative hearing opposition. Therefore, NBMC again urges the Commission to adopt the application acceptance procedure proposed in its reply comments or, alternatively, to "put the 42 communities identified in NBMC's and the Commission's studies out in a Docket 80-90 style proceeding in a set of filing windows."[11]

15. In the comments it filed in support of NBMC's reconsideration petition, NPR also questions the Commission's conclusion that few areas would be available for the new channels, noting that CPB and NBMC had both identified numerous locations where AM stations on these foreign clear channels would serve new audiences. In light of the importance of expanding public radio service and increasing minority ownership of broadcast facilities, NPR urges the Commission to reconsider its earlier action and adopt any one of three possible approaches to realize these goals. The procedures proposed by NPR include: (1) imposition of the proposed non-technical acceptance criteria; (2) use of the modified application acceptance procedure suggested by NBMC; or (3) use of a window procedure for AM stations which are identified by the Commission with the help of CPB, NBMC, and others.

16. Our careful review of NBMC's petition and NPR's comments and our reexamination of the record in this proceeding reveal no new arguments that were not adequately addressed by the Commission in its *Second Report*. Contrary to the assertions of NBMC and NPR, we con-

tinue to believe that the engineering studies referenced in our *Further Notice* amply support our conclusion that the vast majority of opportunities for new stations on foreign clear channels exist in unserved or underserved areas. Nothing in NBMC's petition or NPR's comments convinces us otherwise. Indeed, NBMC does not directly attack our conclusion that most of the available frequencies lie in sparsely populated areas. Rather, the thrust of its argument is that substantial opportunities also exist for the establishment of new stations in more densely populated, attractive, competitive areas.[12]

17. We note that the areas identified by NBMC appear to track those depicted in the maps attached to our *Further Notice* where, at first glance, it appears that new full-time stations *might* theoretically be possible. Again, we must reiterate that the maps "were not designed to show *conclusively* where new stations could be established" but rather "were merely intended to serve as a rough guide in identifying potential areas that might be suitable for new stations."[13] As we stated in the *Second Report*, any proposed station would have to be located at some distance from the cross-hatched areas on the map to avoid prohibited overlap with existing station contours and, secondly, any such station would have to comply with important nighttime restrictions which, we emphasized, could not be depicted on the maps. NBMC's petition, however, fails to take these important considerations into account.[14] Therefore, for these reasons, we decline to accord NBMC's analysis significant weight. We reaffirm our original holding that, in view of the relatively few opportunities to establish new full-time stations on the foreign clear channels and the even more limited opportunities to establish such stations in the more populated areas of the country, the public interest would not be served by the adoption of non-technical acceptance criteria.

18. In reaffirming our decision, however, we wish to emphasize that the Commission has never and does not now conclude that *no* opportunities exist in urban areas. In fact, the Commission explicitly acknowledged in the *Second Report* that there are a few opportunities in such areas.[15] As we stated earlier, though, we do not believe that the possible existence of a few exceptions to the general pattern of usage of these foreign clear channels refutes or undermines the validity of the Commission's basic conclusions regarding frequency availability. We determined in the *Second Report* and continue to believe that such exceptions do not warrant the imposition of non-technical acceptance criteria.

19. Finally, as we stated in the *Second Report*, minorities and noncommercial broadcasters will not be limited from applying for new stations on the newly available frequencies to the extent that such opportunities exist in urban areas and elsewhere. Moreover, we note that, in the case of minority applicants, they would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station. As we stated in MM Docket 85-39 in deleting the non-technical acceptance criteria applicable to the domestic clear channel frequencies, this regulatory tool, as well as the other regulatory measures we have adopted, constitutes a sounder approach toward increasing minority ownership opportunities.[16] Because we believe that our initial conclusions regarding opportunities to use the foreign clear channels remain valid, and we continue to believe that the NBMC/NPR proposed alternative procedures have been inappropriately raised in this proceeding, there is no need to address the alternative acceptance procedures suggested by NBMC and NPR.

20. After carefully reviewing NBMC's petition for reconsideration, we believe that the public interest is best served by implementing the rules governing the operation of new AM stations on Canadian, Mexican and Bahamian Class I-A clear channels, as originally affirmed in the *Second Report*. We, therefore, will deny NBMC's petition for reconsideration.

21. Accordingly, pursuant to authority found in 47 U.S.C. Sections 303 and 405, IT IS ORDERED, THAT the petition for reconsideration IS DENIED for the reasons stated herein. IT IS FURTHER ORDERED, THAT this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Second Report and Order* in MM Docket No. 84-281, 3 FCC Rcd 3597 (1988).

[2] *Notice of Proposed Rule Making* in MM Docket No. 84-281, 49 FR 18567 (May 1, 1984).

[3] *Report and Order* in MM Docket No. 84-281, 101 FCC 2d 1 (1985).

[4] *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1985). In particular, the court expressed concern over the adoption of rules that differed sharply from those proposed, especially when the decision was based on unpublished studies. *Id.* at 1022-23.

[5] *Further Notice of Proposed Rule Making* in MM Docket No. 84-281, 2 FCC Rcd 4884 (1987).

[6] NBMC did not submit initial comments in this proceeding.

[7] In 1985, the Commission deleted similar non-technical acceptance criteria for AM applications for the 25 U.S. Class I-A clear channels that were set forth in Section 73.37(e) of the Commission's Rules on the basis that they were no longer necessary to serve the public interest. Deletion of AM Application Acceptance Criteria, *Report and Order*, 102 FCC 2d 548. A petition for reconsideration of this decision, filed by NBMC, is currently pending.

[8] The Commission noted that this was not "a situation where reservation of frequencies is necessary to ensure that minority or noncommercial voices will be heard. The available sites for these channels are in areas where there is sufficient vacant spectrum, in both the FM and television bands, to accommodate the needs of these interests." *Second Report*, 3 FCC Rcd at 3599.

[9] In its petition, NBMC claims that it has identified 34 sizeable communities in which one or more full-time stations would be possible, with a total SMSA or county 1980 population of 4,739,000 and a minority SMSA/county 1980 population totalling 768,000. *See* NBMC Petition for Reconsideration at 1, Exhibit 1.

[10] According to NBMC, the Commission identified an additional eight communities with total SMSA/county populations of 1,088,000 and minority SMSA/county populations totalling 106,000 in its analysis of CPB's list of markets (which CPB believed could be served by use of one or more of the foreign clear channel frequencies). NBMC Petition for Reconsideration at 1, Exhibit 2. However, our analysis took into account only technical considerations that immediately indicated whether a frequency could be used, and on that basis we determined that 19 of the 27 listed markets were not feasible. As we noted in the *Second Report*, in those remaining 8 markets where our analysis indicated that a frequency might be usable, additional technical factors must still be considered to determine if the frequencies could be used in actual practice. *Second Report*, 3 FCC Rcd at 3600, App. A.

[11] NBMC Petition for Reconsideration at 3. NBMC claims that "minorities have had three years of successful experience with Docket 80-90, and would find such procedures to be familiar and attractive." *Id.*

[12] Examples of the communities (and their 1980 population bases) listed by NBMC as areas for potential AM stations on the foreign clear channels include Billings (67,000), Butte (37,000), and Missoula (33,000), all in Montana. The most densely populated communities listed were Bakersfield, California with 106,000 people and Las Vegas, Nevada with a population of 165,000. *See* NBMC Petition for Reconsideration, Exhibit 1 at 1, 3.

[13] *Second Report*, 3 FCC Rcd at 3599 (emphasis in original). We specifically stated that the maps did not "reflect each and every technical parameter that could possibly relate to where new stations could be located," nor did they take into account "certain specific technical factors" individual applicants would have to keep in mind in determining the feasibility of a station in a given location. *Id.*

[14] Although the *Further Notice* in this proceeding was released in July, 1987, with the Commission's studies attached, NBMC did not raise its arguments regarding the sufficiency of the Commission's studies until the filing of its its petition for reconsideration on July 8, 1988. While the Commission is thus not required to consider these arguments here, 47 CFR Section 1.429(b), in the interest of responding to all of NBMC's concerns, we will do so.

[15] *Second Report*, 3 FCC Rcd at 3599.

[16] *See Report and Order*, 102 FCC 2d at 557-58. Similarly, we have reserved specific frequencies for noncommercial entities. 47 CFR Sections 73.202 and 73.606.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Report No. DS-868

Released: June 19, 1989

COMMON CARRIER SERVICES INFORMATION
PRIVATE RADIO SERVICES INFORMATION

INFORMATIVE:

Two groups of applications have been filed simultaneously with the Common Carrier and Private Radio Bureaus seeking Commission consent to a transfer of control of licenses in various radio services (Domestic Fixed-Satellite Service; Point-to-Point Microwave Radio Services; Private Operational-Fixed Microwave Service). The proposed transfers of control will require a two step process, and they stem from the unsolicited (or "hostile") tender offer KDS Acquisition Corporation (a subsidiary of Paramount Communications, Inc., formerly Gulf+Western Inc.) for all of the outstanding shares of Time Incorporated.

(Step 1)

The first step is for consent to transfer control from the Shareholders of Time Incorporated and its subsidiaries to The Honorable Donald H. Rumsfeld as Trustee of a Voting Trust, pursuant to a Special Temporary Authorization. Upon initial review, the applications for Step 1 listed below have been found to be acceptable for filing. The Commission reserves the right to dismiss any of these applications if upon further examination it is determined that they are defective and not in conformance with Commission rules and policies.

Domestic Fixed-Satellite Service:

1563-SSA-TC-89(3) Consent to the transfer of control of American Cablevision of Carolina, Inc., Call Signs WR95, WB89, and E2083, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1565-SSA-TC-89 Consent to the transfer of control of American Cablevision of Indianapolis, Inc., Call Sign E2731, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1567-SSA-TC-89 Consent to the transfer of control of American Cablevision of Monroeville, Inc., Call Sign WX84, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1569-SSA-TC-89(4) Consent to the transfer of control of American Cablevision of PA, Inc., Call Signs E870864, E870511, E870515, and E870514, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1571-SSA-TC-89 Consent to the transfer of control of American Cablevision of Queens, Call Sign E874282, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1573-SSA-TC-89 Consent to the transfer of control of American Cablevision of St. Louis, Inc., Call Sign E3671, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1575-SSA-TC-89 Consent to the transfer of control of American Cablevision of West Memphis, Inc., Call Sign KR31, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1577-SSA-TC-89 Consent to the transfer of control of American Heritage Cablevision, Inc., Call Sign KR61, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1579-SSA-TC-89(95) Consent to the transfer of control of American Television and Communications Corporation, Call Signs WQ73, E4975, KG23, E2168, KN97, E2187, KD47, E5019, E5404, KT89 E2143, KG95, E2952, KG75, E3010, E5079, E5474, WN66, E865161, WX66, E860488, WN60, E850266, E8224, E8225, E880792, WT35, WB71, E4128, E880085, WD53, WF88, KV20, KN81, KN82, E2844, E2735, WQ79, WN67, WR59, WJ48, E3256, E871302, KD51, KD80, KG28, KL89, KL58, WL84, WZ34, WB46, E5382, WF45, E3561, E3039, E2077, KQ95, KH93, E2076, E2074, KL89, E3037, E2075, E4257, WR39, E3030, E2084, E5949, WG86, E3255, E5488, E5489, E860061, WG32, WQ21, E5204, E5133, WG60, E6407, WH48, WG55, E5289, E5980, KP54, WK21, WB94, WG23, E8181, KE47, WQ21, WB88, KF37, KF51, WG86, and WG96, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1581-SSA-TC-89 Consent to the transfer of control of ATC Cablevision of South Pasadena, Call Sign E2816, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1583-SSA-TC-89 Consent to the transfer of control of ATC of Brockport, Inc., Call Sign E4158, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1585-SSA-TC-89(2) Consent to the transfer of control of Birmingham Cable Communications, Inc., Call Signs WZ83 and WG28, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1587-SSA-TC-89 Consent to the transfer of control of Cablevision of Durham, Call Sign WG89, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1589-SSA-TC-89 Consent to the transfer of control of Cablevision of Shreveport, Inc., Call Sign E4773, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1591-SSA-TC-89 Consent to the transfer of control of Capitol Cablevision Systems, Inc., Call Sign WQ80, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1593-SSA-TC-89 Consent to the transfer of control of Carolina's Cable, Inc., Call Sign E2950, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1595-SSA-TC-89 Consent to the transfer of control of Champaign-Urbana Communications, Inc., Call Sign WJ45, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1597-SSA-TC-89 Consent to the transfer of control of Erie Telecommunications, Inc. Call Sign E3756, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1599-SSA-TC-89 Consent to the transfer of control of Greater Rochester Cablevision, Inc., Call Signs E8309 and E2131, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1601-SSA-TC-89 Consent to the transfer of control of Home Box Office, Inc., Call Sign E4063, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1603-SSA-TC-89(7) Consent to the transfer of control of Kansas City Cable Partners, Call Signs KE78, KZ28, KZ31, KS32, E3888, E5191, and KH34, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1605-SSA-TC-89 Consent to the transfer of control of Laurel Cablevision, Inc., Call Sign WP27, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1607-SSA-TC-89(2) Consent to the transfer of control of Lower Bucks Cablevision, Inc., Call Signs WZ49 and E5090, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1609-SSA-TC-89(5) Consent to the transfer of control of Memphis CATV, Inc., Call Signs E2481, E2712, E3369, WS61 and E4060, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1611-SSA-TC-89 Consent to the transfer of control of Mile-Hi Cablevision Associates, Ltd., Call Sign E5912, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1613-SSA-TC-89 Consent to the transfer of control of N.E.W. Media Inc., Call Sign E2685, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1615-SSA-TC-89(3) Consent to the transfer of control of Oceanic Cablevision, Inc., Call Signs E880530, KF71 and E880535, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1617-SSA-TC-89(38) Consent to the transfer of control of Paragon Communications, Call Signs KG41, E6226, WB93, WF53, WF58, WQ38, EF52, E2409, WF50, WT63, E880119, WF51, E860483, WM77, E2561, WJ21, WL56, WL77, WL71, E3608, WL75, WL75, WL57, E860476, WL73, WL72, KZ97, KU99, E2059, KZ29, KB72, E7878, KJ44, E4090, E2443, E4400, KE90 AND KR91, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1619-SSA-TC-89(4) Consent to the transfer of control of Public Cable Company, Call Signs WH47, E870043, E881078 and E870042, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

1621-SSA-TC-89 Consent to the transfer of control of Rockingham-Hamlet Cablevision, Inc., Call Sign WN78, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

Point-to-Point Microwave Service:

STA-3305-89 Consent to the transfer of control of American Television and Communications Corporation from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

Private Operational Fixed Microwave Service:

901348 Consent to the transfer of control of Time, Inc., Call Signs WNEE977 and WNEE978, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

901350 Consent to the transfer of control of American Television and Communications Corporation, Call Signs WNEM482, WNEM744, WNEN404, WNES310, WNES311, and WNES312, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee. (Step 2)

901382 Consent to the transfer of control of Kansas City Cable Partners, Call Signs WNEN498 and WNEN499, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

901332 Consent to the transfer of control of Paragon Communications, Call Signs WNEW367, WNEW368, WNEW369, WNEW370, and WNEQ600, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

901340 Consent to the transfer of control of Greater Rochester Cablevision, Inc. Call Signs WNEH741, WNEO920, and WNEO921, from Shareholders of Time Incorporated to The Honorable Donald H. Rumsfeld, Voting Trustee.

(Step 2)

The second step seeks approval for KDS Acquisition Corp. to assume control of Time Incorporated. Upon initial review, the applications for Step 2 listed below, have been found to be acceptable for filing. The Commission reserves the right to dismiss any of these applications if upon further examination it is determined that they are defective and not in conformance with Commission rules and policies.

Domestic Fixed-Satellite Service:

1562-DSE-TC-89(3) Consent to the transfer of control of American Cablevision of Carolina, Inc., Call Signs WR95, WB89, and E2083, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1564-DSE-TC-89 Consent to the transfer of control of American Cablevision of Indianapolis, Inc., Call Sign E2731, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1566-DSE-TC-89 Consent to the transfer of control of American Cablevision of Monroeville, Inc., Call Sign WX84, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1568-DSE-TC-89(4) Consent to the transfer of control of American Cablevision of PA, Inc., Call Signs E870864, E870511, E870515, and E870514, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1570-DSE-TC-89 Consent to the transfer of control of American Cablevision of Queens, Call Sign E874282, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1572-DSE-TC-89 Consent to the transfer of control of American Cablevision of St. Louis, Inc., Call Sign E3671, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1574-DSE-TC-89 Consent to the transfer of control of American Cablevision of West Memphis, Inc., Call Sign KR31, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1576-DSE-TC-89 Consent to the transfer of control of American Heritage Cablevision, Inc., Call Sign KR61, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1578-DSE-TC-89(95) Consent to the transfer of control of American Television and Communications Corporation, Call Signs WQ73, E4975, KG23, E2168, KN97, E2187, KD47, E5019, E5404, KT89 E2143, KG95, E2952, KG75, E3010, E5079, E5474, WN66, E865161, WX66, E860488, WN60, E850266, E8224, E8225, E880792, WT35, WB71, E4128, E880085, WD53, WF88, KV20, KN81, KN82, E2844, E2735, WQ79, WN67, WR59, WJ48, E3256, E871302, KD51, KD80, KG28, KL89, KL58, WL84, WZ34, WB46, E5382, WF45, E3561, E3039, E2077, KQ95, KH93, E2076, E2074, KL89, E3037, E2075, E4257, WR39, E3030, E2084, E5949, WG86, E3255, E5488, E5489, E860061, WG32, WQ21, E5204, E5133, WG60, E6407, WH48, WG55, E5289, E5980, KP54, WK21, WB94, WG23, E8181, KE47, WQ21, WB88, KF37, KF51, WG86, and WG96, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1580-DSE-TC-89 Consent to the transfer of control of ATC Cablevision of South Pasadena, Call Sign E2816, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1582-DSE-TC-89 Consent to the transfer of control of ATC of Brockport, Inc., Call Sign E4158, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1584-DSE-TC-89(2) Consent to the transfer of control of Birmingham Cable Communications, Inc., Call Signs WZ83 and WG28, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1586-DSE-TC-89 Consent to the transfer of control of Cablevision of Durham, Call Sign WG89, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1588-DSE-TC-89 Consent to the transfer of control of Cablevision of Shreveport, Inc., Call Sign E4773, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1590-DSE-TC-89 Consent to the transfer of control of Capitol Cablevision Systems, Inc., Call Sign WQ80, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1592-DSE-TC-89 Consent to the transfer of control of Carolina's Cable, Inc., Call Sign E2950, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1594-DSE-TC-89 Consent to the transfer of control of Champaign-Urbana Communications, Inc., Call Sign WJ45, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1596-DSE-TC-89 Consent to the transfer of control of Erie Telecommunications, Inc. Call Sign E3756, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1598-DSE-TC-89 Consent to the transfer of control of Greater Rochester Cablevision, Inc., Call Signs E8309 and E2131, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

1600-DSE-TC-89 Consent to the transfer of control of Home Box Office, Inc., Call Sign E4063, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

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1612-DSE-TC-89 Consent to the transfer of control of N.E.W. Media Inc., Call Sign E2685, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

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1616-DSE-TC-89(38) Consent to the transfer of control of Paragon Communications, Call Signs KG41, E6226, WB93, WF53, WF58, WQ38, EF52, E2409, WF50, WT63, E880119, WF51, E860483, WM77, E2561, WJ21, WL56, WL77, WL71, E3608, WL75, WL75, WL57, E860476, WL73, WL72, KZ97, KU99, E2059, KZ29, KB72, E7878, KJ44, E4090, E2443, E4400, KE90 AND KR91, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

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1620-DSE-TC-89 Consent to the transfer of control of Rockingham-Hamlet Cablevision, Inc., Call Sign WN78, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

Point-to-Point Microwave Service:

3306-CF-TC(82)-89 Consent to the transfer of control of American Television and Communications Corporation from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

Private Operational-Fixed Microwave Service:

910349 Consent to the transfer of control of Time, Inc., Call Signs WNEE977 and WNEE978, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

901351 Consent to the transfer of control of American Television and Communications Corporation, Call Signs WNEM482, WNEM744, WNEN404, WNES310, WNES311, and WNES312, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

901383 Consent to the transfer of control of Kansas City Cable Partners, Call Signs WNEN498 and WNEN499, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

901333 Consent to the transfer of control of Paragon Communications, Call Signs WNEW367, WNEW368, WNEW369, WNEW370, and WNEQ600, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

901341 Consent to the transfer of control of Greater Rochester Cablevision, Inc. Call Signs WNEH741, WNEO920, and WNEO921, from The Honorable Donald H. Rumsfeld, Voting Trustee, to KDS Acquisition Corporation.

These applications will be available for public inspection in the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. during its normal operating hours. Copies of these documents may be obtained from International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, Phone Number (202) 857-3800.

For further information, contact Fern Jarmulnek, Satellite Radio Branch, (202) 624-1624; Terry Reideler, Domestic Radio Branch, (202) 634-1773; or Jerry Franz, Private Radio Bureau, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-116

In the Matter of

FCC Procedure for Measurement of Intentional Radiators (Except for Periodic and Spread Spectrum Devices and Devices Operating below 30 MHz)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 12, 1989; Released: June 29, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to establish a new procedure for measuring electromagnetic emissions from intentional radiators operating under Part 15 of the Commission's Rules. This new procedure, "FCC Procedure for Measurement of Intentional Radiators (Except for Periodic and Spread Spectrum Devices and Devices Operating below 30 MHz), FCC/OET TP-3" (TP-3),[1] is intended to set forth uniform methods for testing such devices for compliance with the technical standards adopted in the Commission's recent comprehensive revision of Part 15.[2]

BACKGROUND

2. In the *First Report and Order* in GEN. Docket No. 87-389 (Docket No. 87-389) the Commission, *inter alia*, adopted new classifications for non-licensed RF devices permitted to operate under Part 15.[3] One of the new classifications, intentional radiators, includes devices that intentionally generate and emit radio frequency energy by radiation or induction. Examples of intentional radiators include walkie talkies, cordless telephones, auditory assistance devices, and wireless microphones. These devices were classified as restricted radiation devices under the former Part 15 rules.

3. In Docket No. 87-389, the Commission revised a number of the technical standards that apply to intentional radiators, including the limits on permissible electromagnetic emissions (EME), the permissible bandwidth occupied, and the permissible operating frequency and frequency deviation. The Commission also specified certain requirements for measuring emissions from such devices for the purpose of determining compliance with the rules. For example, the rules were revised to specify the use of instrumentation with peak, average and quasi-peak detector functions, extend the range of frequencies to be measured for EME to include frequencies above 1000 MHz, standardize the range of the scan height of the measuring receiver antenna at 1 to 4 meters and establish the measurement distance for most intentional radiators at a uniform 3 meters.

4. The Commission currently employs several measurement procedures for evaluating Part 15 restricted radiation devices for compliance with the rules.[4] Wireless microphones and auditory assistance devices are measured in accordance with OCE Bulletin 19.[5] Microwave field disturbance senors are measured under the procedures in OCE Bulletin 40.[6] Other types of restricted radiation devices are tested using unpublished, but generally accepted methods for measuring line-conducted and radiated EME from RF devices.

DISCUSSION

5. The new Part 15 rules will permit the operation of new types of intentional radiators for which new measurement procedures must be developed. In addition, the measurement procedures for the types of restricted radiators authorized under the existing rules will need to be revised when the new Part 15 rules become effective. The measurement procedure TP-3 is designed to address these needs for both new and modified test procedures.[7] The new procedure, which is presented in Appendix A, would provide measurement instructions for all intentional radiators except those operating on frequencies below 30 MHz and systems using pulsed emissions or spread spectrum techniques, as indicated above. The proposed TP-3 would have the full force and effect of FCC regulations. In order to make the test procedures more readily available and to clarify that they have the force of rules we intend to include the test procedures in the Commission's rules.

6. The proposed TP-3 specifies the test environment, test instrumentation, configuration of the equipment under test and instructions for setting up and performing measurements to be used in evaluating intentional radiators for compliance with the Part 15 technical standards. Instructions are provided for measuring: 1) line conducted EME; 2) radiated EME; 3) operating frequency; 4) operating frequency stability with variation in ambient temperature: 5) operating frequency with variation in primary supply voltage; 6) occupied bandwidth; and 7) input power. The proposed TP-3 also provides instructions for recording/reporting test results.

7. The provisions of the proposed measurement procedure differ from those of the existing procedures for measuring restricted radiation devices in a number of respects. Some of these changes reflect the new measurement standards that were adopted in Docket No 87-389. For example, the proposed TP-3 provides for using a CISPR quasi-peak detector to measure the line-conducted EME and the radiated EME below 1000 MHz of most types of equipment newly authorized under Docket No. 87-389.[8] Under the existing procedures, these measurements are performed using an average detector. The proposed TP-3 provides for the use of quasi-peak, average and peak detector functions for measuring EME from types of devices authorized under the former Part 15 rules. In addition, the proposed test for line-conducted EME specifies measurements over the range .45 to 30 MHz, whereas the existing procedures require such measurements over the more limited range .45 to 25 MHz. The proposed new procedure also, for the first time, would require radiated measurements above 1000 MHz. These radiated EME

measurements would be performed using both the average and peak detector functions. Finally the new procedure would standardize the distance of the antenna from the equipment under test in radiated EME measurements at 3 meters. This differs from the existing procedures, which specify distances from 3 to 30 meters depending on the device being tested.

8. The proposed TP-3 also includes a number of refinements intended to improve the quality and consistency of the measurement results. For example under the proposed procedure, a 50 uH/ 50 ohm line impedance stabilization network (LISN) would be used in the line-conducted EME tests instead of the 5 uH/50 ohm LISN currently used. Also, radiated EME tests uniformly would be conducted with the receiving antenna varied in height from 1 to 4 meters rather than the current practice of a variety of antenna heights depending on the present specified test distance.

9. OCE Bulletin 19 allows a 4 dB reduction of the measured radiated EME for wireless microphones that operate on the frequencies in the 88-108 MHz band and auditory training transmitters that operate in the 72-76 MHz and 88-108 MHz bands under the Part 15 rules. This reduction was provided in recognition of the attenuation in signal strength that results when a device is hand-held or worn close to the body. The adjusted radiated EME measurement is the value to be compared to the radiated EME limits for these devices to determine compliance. It appears that many wireless microphones and auditory training devices now are being operated in applications where they are not held in the hand or worn close to the body. We therefore propose to delete the special 4 dB signal strength reduction for these devices from our test procedures. However, we recognize that this change could adversely affect products currently under development or modification. We therefore propose to continue to apply the 4 dB reduction in measured signal strength to wireless microphones and auditory training devices during the transition period provided for such devices to come into compliance with the new Part 15 rules.[9]

10. Finally, the proposed TP-3 sets forth a new input power measurement procedure that would be intended to assist the hobbyist and in-house fabricators in adhering more closely to the rules. This procedure would only be intended for use by parties who construct home-built or developmental devices that are not to be marketed. This would be the first time a procedure of this type would be included in a published measurement procedure.

11. Comments are requested on the degree to which the proposed measurement procedure would provide an effective means of evaluating intentional radiators for compliance with the rules. Comments are also sought on the burden, in terms of both direct costs and time to complete tests, this procedure would impose on those who evaluate Part 15 intentional radiators. We invite suggestions for minimizing this burden in a manner that would not compromise the quality and consistency of the test measurements. In addition, comments are requested on whether the format of the test procedure is clear and whether the level of guidance furnished in the procedure is sufficient to permit the procedures to readily performed. Interested parties are requested to suggest changes which would improve the accuracy and repeatability of the test results when measurements are performed at different facilities.

12. In conclusion, we welcome comments on all aspects of the proposed test procedures, and any other issues that may bear on the effectiveness of these procedures for safeguarding the radio frequency environment with the minimum burden on equipment suppliers. However, we do not intend to consider comments that deal with issues that were previously decided or are being addressed in related proceedings. In particular, we will not consider comments proposing changes in the technical standards for intentional radiators.

PROCEDURAL MATTERS

13. Under the procedures set out in Section 1.415 of the Commission's Rules, interested persons may file comments on or before **August 21, 1989,** and reply comments on or before **September 5, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided such information or writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

14. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and five (5) copies of their comments and other materials. Participants wishing each Commissioner to have a copy of their comments should file an original and 11 copies. Members of the public who wish to express their comments are given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters in Washington, D.C.

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that the matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data

or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

17. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and Purpose of this action: The purpose of this proposed procedure is to set forth uniform methods for testing intentional radiators for compliance with the recent comprehensive revision of Part 15 of the Commission's Rules adopted in the *First Report and Order* in Gen. Docket No. 87-389. Since the existing measurement procedures used to evaluate these devices are not satisfactory for evaluating devices under the revised rules, it is necessary to develop a new measurement procedure.

II. The objectives: Our objective in proposing this new measurement procedure for intentional radiators is to provide the basis for a consistent and repeatable test program for evaluating these devices for compliance with the newly revised rules.

III. Legal Basis: The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304, and 307 of the Communications Act of 1934, as amended.

IV. Description of potential impact and number of small entities affected: It is believed that the test procedure will benefit manufactures and test laboratories by speeding testing and reducing compliance costs. The proposed test procedure would modify the present procedures for measuring intentional radiators. Its adoption potentially would affect all manufacturers of intentional radiators and laboratories performing equipment authorization tests on such devices. However, the exact number of small entities affected is not known.

V. Recording, record keeping and other compliance requirements: The proposed measurement procedures would increase the reporting/record keeping requirements of parties responsible for Part 15 intentional radiators to the extent that the range of frequencies that must be measured has been increased slightly. However the format and content of the reporting/recording requirements has not been significantly modified.

VI. Federal rules which overlap or conflict with this rule: None.

VII. Any significant alternates minimizing impact on small entities and consistent with the stated objectives: None.

18. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the office of Management and Budget as prescribed by the Act.

19. For further information on this proceeding, contact Richard Fabina, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD. 21046, telephone (301) 725-1585. For further information concerning Part 15 of the Commissions Rules contact, FCC, Technical Standards Branch, Room 7122, 2025 M St. N.W., Washington D.C. 20554, telephone (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A - NPRM IN FCC GENERAL DOCKET 89-116

THIS DOCUMENT IS INTENDED TO SOLICIT COMMENTS AND THE PROCEDURES CONTAINED HEREIN MAY NOT BE USED FOR COMPLIANCE TESTING UNTIL ADOPTED BY THE COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION

FCC PROCEDURE FOR MEASUREMENT OF INTENTIONAL RADIATORS (EXCEPT FOR PERIODIC, SPREAD SPECTRUM AND DEVICES OPERATING BELOW 30 MHz)

Federal Communications Commission
Authorization and Evaluation Division
7435 Oakland Mills Road
Columbia, MD 21046

FCC/OET TP-3 (1989) May 1989

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SECTION I - GENERAL

This section applies to the testing of all intentional radiators subject to this procedure.

1 INTRODUCTION

The procedure described herein sets forth uniform methods for testing intentional radiators for compliance with Part 15 of the FCC Rules and Regulations, 47 CFR Part 15. Such equipment is to be measured for compliance with the limits for conducted electromagnetic emissions (EME), radiated EME and other technical requirements which are set forth in the applicable portions of Part 15. This document specifies the environment, test instrumentation and equipment, requirements for the configuration of the equipment under test (EUT), test set-up, and measurement steps to be used in testing of intentional radiators for compliance with the FCC rules above 30 MHz.

1.1 Applicability

These procedures are to be used to determine compliance of most types of intentional radiators with the EME limits and other technical requirements specified in Part 15 of the FCC rules. Intentional radiators such as carrier current systems and other devices which operate or have spurious emissions on frequencies below 30 MHz and systems using pulsed or spread spectrum techniques require specialized measurement procedures and are not covered herein. Refer to publication FCC/OET TP-6 for the measurement procedure for testing devices using pulsed modulation, publication FCC/OET TP-7 for the measurement procedure for testing devices using spread spectrum techniques and publication FCC/OET TP-2 for the measurement procedure for testing carrier current systems and other devices for radiated emissions below 30 MHz.

Other procedures may be used provided that the party responsible for the equipment demonstrates that the methods used yield results that are expected to be the

same as the results that would be obtained using these procedures. In the event of a dispute, the results of tests performed in accordance with the procedures described herein will prevail.

1.2 Definitions

The definitions in Parts 2 and 15 of the FCC rules and the following definitions apply for purposes of these test procedures. The definitions in the *IEEE Standard Dictionary of Electrical and Electronics Terms,* 2nd Edition, IEEE-100-1984, also apply. Where there are differences between the IEEE definitions and the FCC definitions, as set forth in the rules and herein, the FCC definitions shall apply.

1.2.1 *Auditory assistance device* - An intentional radiator used to provide auditory assistance to a handicapped person or persons. Such a device may be used for auricular training in an educational institution, for auditory assistance at places of public gatherings, such as a church, theater, or auditorium, and for auditory assistance to handicapped individuals, only, in other locations.

1.2.2 *Biomedical telemetering device* - An intentional radiator used to transmit measurements of either human or animal biomedical phenomena to a receiver.

1.2.3 *Cable locating equipment* - An intentional radiator used intermittently by trained operators to locate buried cables, lines, pipes and similar structures or elements. Operation entails coupling a radio frequency signal onto the cable, pipe, etc. and using a receiver to detect the location of that structure or element.

1.2.4 *Carrier current system* - A system that transmits radio frequency energy by conduction over the electric power lines. A carrier current system can be designed such that the signals are received by conduction directly from connection to the electric power lines (unintentional radiator) or the signals are received over-the-air due to radiation of the radio frequency signals from the electric power lines (intentional radiator).

1.2.5 *Cordless telephone system* - A system consisting of two transceivers, one a base station that connects to the public switched telephone network and the other a mobile handset unit that communicates directly with the base station. Transmissions from the mobile unit are received by the base station and then placed on the public switched telephone network. Information received from the switched telephone network is transmitted by the base station to the mobile unit. Note: The Domestic Public Cellular Radio Telecommunications Service is considered to be part of the switched telephone network. In addition, intercom and paging operations are permitted provided these are not intended to be the primary modes of operation.

1.2.6 *Equipment under test (EUT)* - A representative sample of a device or system under test in a standard test configuration. This includes the intentional radiator, system components, support equipment and connecting cables.

1.2.7 *Field disturbance sensor* - A device that establishes a radio frequency field in its vicinity and detects changes in that field resulting from the movement of persons or objects within its range.

1.2.8 *Intentional radiator* - A device that intentionally generates and emits radio frequency energy by radiation or induction.

1.2.9 *Perimeter protection system* - A field disturbance sensor that employs leaky cables as the radiating source. These cables are installed in a manner that allows the system to detect movement within the protected area.

1.2.10 *Simulator* - A device used in lieu of an actual product accessory which emulates the impedances, RF signals, electrical characteristics and interaction with the EUT of that product accessory.

1.2.11 *Support equipment* - An attachment or accessory to which the equipment under test is physically connected for auxiliary control or product enhancement.

1.3 Requests for Interpretations

Parties seeking interpretations or having questions about Part 15 regulations are invited to write to:

Chief, Technical Standards Branch
Federal Communications Commission
2025 M Street, N.W., Room 7122
Washington, D.C. 20554

Questions concerning the procedures set forth herein should be addressed to:

Chief, Authorization and Evaluation Division
F.C.C. Laboratory
7435 Oakland Mills Road
Columbia, Maryland 20146.

2 TEST ENVIRONMENT

2.1 Test Sites

Conducted EME measurements may be made at any suitable facility, including a shielded room, provided the facility otherwise meets the requirements for a proper test environment as specified below. Radiated EME measurements of the EUT should be made on an open area test site, or its equivalent, meeting the minimum requirements described in FCC/OET Bulletin 55 (See reference [1]). An alternative site may be used for radiated EME measurements provided that the results are satisfactorily correlated to those that would be obtained on an open area test site. A shielded room is not acceptable for making radiated EME measurements unless it is properly lined with EME absorbing material to eliminate reflections of emissions.

2.2 Ambient EME

It is desirable that the level of both the conducted and radiated ambient EME at the test site be at least 6 dB below the FCC limits applicable to the EUT. It is, of course, not always possible to meet this condition. If the ambient field strength and/or power-line level at some frequencies within the specified measurement ranges are too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements at the closest distance possible as permitted by near field considerations and convert the results to the equivalent level at the specified limit distance.

2) Perform measurements in critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

3) Perform measurements in a room lined with EME absorbing material. Note: Measurements made in a non-absorber lined shielded (metal) enclosure are not acceptable for the purpose of determining compliance with radiated EME limits.

4) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

5) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EUT.

2.3 Temperature

The ambient temperature of the testing area should be within the range of 4 to 35 degrees Celsius (40 to 95 degrees Fahrenheit) unless the particular equipment requirements specify testing over a different temperature range.

2.4 Ground Plane

A ground plane or screen is required where line conducted EME tests are performed at laboratory facilities, but is not mandatory where the tests are performed at an on-site installation of the EUT. This ground plane is to consist of a conducting floor and at least one vertical earth-grounded conducting surface, e.g. the metal floor and a metal wall of a shielded test chamber. Each of these conducting surfaces is to be at least 2.0 x 2.0 meters in size. The part of the ground plane on the floor of the facility is to be covered by insulating material at least 3 millimeters thick, e.g. rubber matting or floor tile.

The use of a metal ground plane is strongly recommended for measurement of radiated EME. A ground plane is required if the test site is elevated above ground level (such as on a rooftop or raised platform), or located on pavement (such as asphalt or concrete). See OET Bulletin 55 (reference [1]) for information regarding the size and material for a ground plane. Open area test sites are likely to need a ground plane when any of the following conditions exist at the site:

1) The terrain is discontinuous.

2) The terrain is subject to extreme seasonal variations in ground conductivity.

3) There are unburied power or control cables on the site.

4) The soil is sandy or rocky.

A ground plane should only be used for on-site testing when it will be a permanent part of the installation.

3 TEST INSTRUMENTATION AND EQUIPMENT

3.1 Measuring Instrument

EME measurements generally are to be made with a radio noise meter conforming to the specifications in references [2] and [3]. Refer to Section 15.35, 15.209 and the specific section of the FCC Rules in Appendix 2 under which the intentional radiator is to be operated for more details concerning measurement instrumentation requirements.

Other instrumentation, such as a spectrum analyzer, may be used for making these measurements. For some tests, such as bandwidth measurements, the test procedure recommends that a spectrum analyzer be used. It is preferred that other measurement instruments also conform to the specifications in references [2] and [3]. In all cases, measurements taken with a measuring instrument that meets the above specifications will take precedence.

When a spectrum analyzer is used as the measuring instrument, appropriate accessories should be employed to provide sufficient sensitivity and overload protection to insure accurate and repeatable measurements of all emissions over the specified frequency range. The accessories needed will depend upon the specific measurement task and may include preamplifiers for improving sensitivity, filters and attenuators for overload protection, and additional quasi-peak detection circuitry. In this case, overload is harmonic distortion, intermodulation, or gain compression of spectrum analyzer input signals. If a post-detector filter is used, its bandwidth must be wide enough so as not to affect peak detector readings. Prior to taking final measurements, it may be necessary to take precautions to ensure that the spectrum analyzer operates linearly. The user's manual of the spectrum analyzer should be reviewed for instructions and guidance in this area. Application notes on the use of spectrum analyzers and other measurement instruments also are available from several manufacturers of this type of equipment.

Automatic scan techniques may be used, but the maximum scan speed is to be limited by the response time of the measuring system and, where applicable, by the repetition rate of the emissions being measured to ensure that the maximum levels of all emissions are measured. When such techniques are employed, extreme caution must be exercised to ensure that each emission is maximized.

Other instruments may be used for certain of the restricted and specialized measurements described herein (e.g. frequency and bandwidth measurements), providing data so obtained indicates the performance of the EUT for purposes of comparison of that performance to the relevant FCC standards and requirements.

3.2 Antennas

Measurements of radiated EME are to be made using the following antennas:

Frequency Range	Antenna Type
30 to 1000 MHz	Tuned half-wave dipole
Above 1000 MHz	Linearly polarized horn

Other types of linearly polarized antennas may be used provided that the measurement results can be correlated to measurements made with the listed antennas. However, dipole and horn antennas are the reference antennas.

It is recommended that the measurement antenna be mounted on a stand that will facilitate raising and lowering of the antenna from 1 to 4 meters in height in an even, continuous manner and allow convenient reorienting of the antenna from the horizontal to the vertical plane.

3.3 Environmental Test Chamber

Measurements which require a stable ambient temperature are to be made in an environmental test chamber. The chamber is to be large enough to have the EUT placed totally inside the chamber. This applies to both floor-standing and table-top EUTs. The chamber also must have controls which enable the temperature inside the chamber to be adjusted over the temperature range specified in the section of the FCC Rules in Appendix 2 under which the EUT is to be operated.

3.4 Line Impedance Stabilization Network (LISN)

Measurements of the RF noise voltage on each conductor of the AC power cord of the EUT are to be made with the EUT connected to the public utility power lines through a line impedance stabilization network (LISN). Intentional radiators are to use a LISN having the impedance characteristics shown in Figure 1 (50 H/50 ohm). Any network that provides the impedance characteristics shown in this Figure may be used. In addition, support equipment is to be connected to the power service through one or more additional LISNs of the same type used to power the EUT.

A separate LISN is required for each current carrying conductor in the EUT. AC power to the LISN is to be filtered to eliminate ambient RF voltages. Install an appropriate RF filter on the AC utility power source. The length of power line between each LISN and the RF filter is to be 3.0 meters and this line must be shielded. Electrically bond the LISN enclosure(s) and the RF filter to the ground plane. Each LISN unit is to have a coaxial-type connector that provides a 50 ohm terminating impedance for connection of the measuring instrumentation. A LISN is not to be used during radiated EME measurements since this usage would be outside its designed frequency range.

Commercial LISNs are either single section units with screw terminals or multi-section units that may have either screw terminals or an integral AC outlet. Where it is necessary to add an external AC outlet to a LISN with screw terminals, the outlet must be connected with low-impedance leads that are the minimum length necessary to connect the EUT to the LISN, *e.g.* 3 inches. The short leads are necessary to maintain the rated impedance of the LISN.

3.5 Signal Generator

A signal generator is to be used to calibrate the levels and frequencies of measured emissions. The signal generator is to have a maximum cumulative error of level accuracy of +/- 4.5 dB. The signal generator is to have a digital readout with a frequency accuracy of .01 %.

3.6 Test Platforms

During testing, hand-held or table-top intentional radiators are to be placed on a non-conducting rectangular table or platform with a top surface of 1.0 x 1.5 meters in size and 0.8 meters in height above the ground. For radiated EME measurements, the table used is to be capable of rotating 360 degrees and is to be equipped with AC outlets on the rotator surface. A remote control turntable is recommended for convenience and accuracy in testing.

Floor-standing intentional radiators do not require a test platform. They are placed on the floor for line conducted EME testing or the rotator for radiated EME testing.

3.7 Calibration

The measuring instruments, cables, antennas, and test facility are to be checked and calibrated as necessary on a regular basis to ensure the accuracy of the test results. Antenna cables are to be checked for changes in losses resulting from handling, frequent connection and disconnection, and exposure to the elements.

Antennas used in testing for radiated EME are to be calibrated for their free-space antenna factor to show traceability to the standard dipole antenna of the National Institute of Standards and Technology (formerly the National Bureau of Standards). Since antenna factors indicated by manufacturers may not be accurate, each antenna used for radiated measurements should be calibrated.

The impedance and isolation of each line impedance stabilization network (LISN), sometimes termed an artificial mains network, used for measuring conducted EME should be checked at least once a year in accordance with the procedure described in the attached Appendix 1.

4 CONFIGURATION OF EQUIPMENT UNDER TEST

4.1 Configuration of Equipment Under Test

The EUT shall be configured in a manner representative of the equipment as typically used. An intentional radiator marketed to be operated as a stand-alone device is to be tested by itself. Conversely, an intentional radiator designed and marketed to be operated as part of a multi-unit system shall be tested with all the system components, accessories, connecting cables, etc. normally used with the device attached to it and operating, to the extent possible, in a manner that is representative of actual use.

4.2 EUT System Cables

An intentional radiator with connecting ports is to be connected to each system component or support device by a connecting cable. Interconnecting cables are to be of the type and length recommended for use with the equipment as marketed or as otherwise specified by the manufacturer of the equipment. If multiple lengths of cable may be used interchangeably with the equipment, the cables used are to be of the length that maximizes emissions. If the lengths of the cables to be used with the equipment are not established, cables one meter in length are to be used for testing. See Section 15.31(g) of the FCC Rules in Appendix 2.

4.3 Conditioning of the EUT

An EUT intended to radiate modulated emissions from an internal source is to be tested with the modulation circuit in normal operation. An EUT equipped with means for external connections for control, monitoring, modulation, etc. is to be tested with typical control, monitoring, modulation, etc. signals applied at the maximum rated input level for the device at the proper impedance.

An EUT intended to transmit only voice modulation is to be tested with typical modulation applied. If the modulation is atypical or unknown, follow the guidelines in Section 2.989 of the FCC Rules in Appendix 2 when applying modulation to the EUT.

4.4 Use of System Components and Simulators

In cases where the EUT is part of a system of interfacing units, the following guidelines are to be used in configuring the EUT for testing:

1) If the EUT is designed to be used with specific support equipment or system components, it is to be tested with that equipment.

2) To the extent possible, the intentional radiator and the support equipment or system components that form the test system for the EUT are to be equipment marketed by the EUT manufacturer. The specific support equipment used with the EUT in the test also is to be of a type typically used with the EUT in normal operation.

3) The support equipment or system components for the EUT are not to be modified in order to enable the EUT to achieve compliance unless the modified device(s) will be marketed with the EUT.

4) Equipment intended to be marketed as a system is to be tested as a system.

5) Because of the added degree of measurement uncertainty that is present when a simulator is employed in the testing process, use of such devices is to be avoided wherever possible. If the EUT is a large device, a simulator may be used in place of actual interfacing units when the logistic circumstances of the equipment installation or the measurement facility would make the use of interfacing units impractical. However, it is important that any simulator used properly represent the electrical characteristics, such as impedances and RF signals, of the device for which it is substituted. In addition, any electrical interaction between the EUT and the actual system component unit due to mechanical characteristics should be duplicated by the simulator.

SECTION II - RADIATED AND CONDUCTED MEASUREMENTS

The test procedures described in this section are to be used to measure the conducted EME and radiated EME of intentional radiators.

5 CONDUCTED EME MEASUREMENTS

Intentional radiators designed to be connected to the AC power lines of a public utility are subject to a limit on the amount of EME coupled back into the power lines. Intentional radiators that are exclusively battery operated with no provisions for operation while connected to the AC power lines are exempt from line conducted emission limits and the measurements specified in section 5 of this procedure. Line conducted EME measurements on intentional radiators that include, or make provision for, the use of battery chargers which permit operating while charging, AC adapters or battery eliminators or that connect to the AC power line indirectly, obtaining their power through another device which is connected to the AC power lines are to be made in accordance with the following procedure:

5.1 Set-up

Step 1)

Place any hand-held or table-top EUT in the center of the test table or platform specified in Section 3.6. Set the test table on an earth-grounded conducting surface as specified in Section 2.4 and position it 0.4 meters from one earth-grounded vertical conducting surface. The table is not be closer to any other earth-grounded surface than 0.8 meters (See Figure 2).

Place any floor-standing EUT on the insulating material which covers the ground plane described in Section 2.4. Position the EUT 0.8 meters from the LISN and any other earth grounded conducting surface.

Step 2)

An EUT, which is an individual hand-held or table-top component, is to be located in the center of the table. An EUT, which is part of a multi-unit system, is to be located in the center along the back edge of the table or in the center of the components on the floor, oriented as it would be in typical usage (see Figure 3).

Prepare EUT for operation, i.e. connect any component support units with cabling as specified in Section 4.2. System components or support equipment for the EUT are to be located on top or to the sides of the EUT as appropriate for a typical operating configuration.

Other arrangements are acceptable where the EUT is designed to be positioned for use in a manner other than that described above, *e.g.* where the intentional radiator and one or more system components are normally operated while lying on their side(s) instead of their bottom. In such cases, the EUT is to be arranged on the test table or floor as it would be in typical usage.

Step 3)

Bundle interconnecting cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter lengths until the overall cable length is approximately one meter. Each such interconnecting cable is to be bundled individually.

Interconnecting cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are, or will be, marketed with the EUT. It is not necessary to bundle EUT system cables that are permanently coiled.

Step 4)

Line conducted EME measurements are to be made with the EUT connected to the public utility lines through a nominal, standardized impedance, which is to be provided through a 50 H/50 ohm LISN as described in Section 3.4. The EUT power cord is to be connected directly to the LISN for these measurements even if the EUT normally receives power through another device in the system. Connect the EUT power cord to the appropriate port on the LISN and connect the LISN to the filter on the AC utility power source. Terminate any unused RF ports on the LISNs into 50 ohms.

If the EUT is not provided with a power cord, the unit is to be connected to the LISN by a power cord of the type specified by the manufacturer. This power cord is to be no longer than 2.0 meters. If a non-flexible power cord is provided with the EUT, it is to be cut to the length necessary to attach the EUT to the LISN.

Step 5)

If the EUT is tested on a table, drape the AC power cord of the EUT over the rear edge of the table and allow it to hang down vertically to the top of the LISN. Wrap excess power cord in a figure "8" pattern around 2 non-metallic pegs that are 9 centimeters high, approximately 2 centimeters in diameter, spaced 10 centimeters on center apart and attached to the top of the LISN (See Figure 4).

If the EUT is tested on the floor, route the AC power cord directly to the LISN and bundle the excess AC power cord in a serpentine fashion in the center, using 30 to 40 centimeter lengths.

If the EUT is provided with a permanently coiled power cord, bundling of the cord is not required.

Step 6)

System components or support devices used to complete the EUT system are to be powered through a second LISN. This equipment is to be powered through a second LISN even where the EUT is provided with AC outlets for supplying power to system components. AC power for all LISNs is to be obtained from the same filtered source. Connect any system components and support equipment associated with the EUT to a second LISN. Additional LISNs may be used, if necessary, to supply power to system components, provided that the number of additional LISNs used is kept to a minimum. Supply lines to the LISNs are to be of the lengths specified in Figure 2 and must be shielded. Terminate unused RF ports on the LISN(s) into 50 ohms.

Step 7)

If the EUT is a part of a system that is tested on a table, drape AC power cords of the system components and support devices onto the insulating material that covers the ground plane. Do not wrap these power cords in a figure 8 pattern atop any LISN or bundle them in a serpentine fashion. No power cords from system components or support equipment are to be draped over the top of a LISN.

If the EUT is tested on the floor, the power cords of those system components or support devices are to lie in any convenient manner on the insulating material which covers the ground plane.

Step 8)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to the ground plane.

Step 9)

Connect the EUT to the equipment that will supply control, monitoring, modulation, etc. signals specified in Section 4.3 to the EUT. If support equipment which provides these signals is normally remotely located, it is to be placed on the test platform no closer than 0.8 meters to the EUT.

Step 10)

Connect the measuring instrument to a section of the LISN supplying power to the EUT using a suitable length of coaxial cable. The input to the measuring instrument is to be transferred in the testing to LISN sections connected to other current carrying conductors of the EUT to measure the line conducted emissions on those conductors. Any unused ports must be terminated into 50 ohms.

Step 11)

Record the arrangement of the equipment on the test table or floor. This is to include a diagram indicating the positions of the individual units of equipment and their interconnecting cables, distances between adjacent units and distances to the edge of the table or wall. Photographs clearly showing the position of the equipment may be used in lieu of, or in addition to, a diagram.

5.2 Testing for Conducted Emissions

Step 1)

Turn on the EUT, select or tune to a frequency or channel in the lower end of the EUT operating range and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Activate the supply of control, monitoring, modulation, etc. signals. Set the 6 dB bandwidth of the measuring instrument to not less than 9 kHz for conducted EME tests and the detector function to the CISPR quasi-peak mode.

> Note: It may be desirable to make preliminary measurements with a spectrum analyzer to speed up the testing since more than one emission at a time can be observed with an analyzer.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure the conducted EME of the EUT. Measurements are to be made by tuning the measuring instrument in a continuous manner over the range 0.45 MHZ to 30 MHz.

Each emission is to be maximized by tuning the EUT or changing the operating channel, varying the mode of operation, and varying the position of the interconnect cables, as applicable. The following modes of operation are to be examined for every EUT:

a) The EUT powered on in standby mode.

b) The EUT operating in a typical fashion.

c) The EUT sending/receiving a typical signal, if applicable.

Maximize each emission individually by rearranging the interconnecting cables. It is not necessary to rearrange the configuration of the system containing the EUT to maximize emissions. Record the most significant emission levels on each conductor of the EUT in the range 0.45 to 30 MHz. If any of these emission levels exceed the FCC limits given in Section 15.207 of the FCC Rules in Appendix 2, the device must be redesigned or modified before the equipment can comply with the FCC technical requirements.

Step 5)

Record the measurements in accordance with the data reporting/recording requirements specified in Section 12.

Step 6)

Transfer the input to the measuring instrument to the section of the LISN connected to the next current carrying conductor of the EUT to be measured. Repeat Steps 4 and 5 until emissions are measured from each current carrying conductor of the EUT.

6 RADIATED EME MEASUREMENTS

All radiated EME from the EUT, including that from system components and interconnecting cables, is to be measured. Radiated EME measurements on all intentional radiators are to be made in accordance with the following procedure:

6.1 Preliminary Testing

It is often useful to perform preliminary radiated EME tests at a distance closer than that specified in the applicable standards to determine the EME characteristics of the EUT. At nearer distances, it is sometimes easier to determine the spectrum signature of the EUT and, in some instances, the positions of cables that produce the maximum level of emissions. A site other than an open field site or equivalent facility may be used for this purpose. However, the test engineer should be aware that alternate sites may not produce results that correlate with results obtained at the required site. During preliminary testing, the EUT should be set-up in the same arrangement and operated in the same manner that will be employed in the actual radiated tests. A spectrum analyzer and broadband antennas are often useful for this type of testing. If a radio noise meter is used in preliminary testing, it is recommended that either headphones or a loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of significant emissions from the EUT. Care must be taken not to miss any significant EME from the EUT during the preliminary tests.

6.2 Set-up

Step 1)

Place a hand-held or table-top EUT atop the non-conducting table or platform specified for radiated tests in Section 3.6. Locate the table on a test site meeting the conditions for radiated tests specified in Section 2.1.

Place a floor standing EUT on a rotator or other non-conducting surface at least 25 centimeters, but no more than 45 centimeters, above the site ground plane.

Step 2)

Arrange the EUT on the table or floor in a position as typical of normal use as possible and prepare it for operation, *i.e.*, connect any component support units with cabling as specified in Section 4.2. If the EUT is an individual hand-held or table-top unit, it is to be located in the center of the test platform. If the EUT is a multi-component system, the components are to be positioned in accordance with the instructions in Step 2 of Section 5.1 as shown in Figure 4.

Step 3)

Bundle EUT system cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter loops until the overall cable length is approximately one meter. Each such EUT system cable is to be bundled individually. EUT system cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless they are marketed with the EUT. Cables that are permanently coiled are not required to be bundled.

Step 4)

Connect the EUT and its support equipment to the AC outlets on the rotator surface. The EUT power cord is to be connected directly to an AC outlet on the rotator for these measurements even if the EUT normally receives power through another device in the system. Allow excess power cord lengths to hang down vertically over the rear edge of the table and lie unbundled on the rotator surface.

Step 5)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to ground at the AC outlet on the rotator.

Step 6)

Connect the EUT to equipment that will supply control, monitoring, modulation, etc. signals, as specified in section 4.3.

Determine the range of the RF spectrum to be searched for radiated EME from the EUT in accordance with the provisions of Section 15.33 of the FCC Rules in Appendix 2.

Note: If radiated EME measurements are required below 30 MHz on a particular intentional radiator, see FCC/OET TP-2 for the recommended test procedure.

Step 7)

Set up the measuring instrument and the proper antenna as specified in Section 3.2 for measuring emissions in the range 30 to 1000 MHz, with connection of the antenna to the measuring instrument through an appropriate length of coaxial cable. Locate the antenna 3 meters or an alternative distance from the EUT as specified in Section 15.31(f) of the FCC Rules in Appendix 2.

Step 8)

Record the arrangement of the equipment on the test table or floor. This is to include a diagram indicating the positions of the individual units of equipment and their interconnecting cables, distances between adjacent units and distances to the edge of the table or wall. Photographs clearly showing the position of the equipment may be used in lieu of, or in addition to, a diagram.

6.3 Testing for Radiated Emissions

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Prepare to measure emissions in the frequency range 30 - 1000 MHz by setting the detector function of the measuring instrument to that required by the Rule section under which the device is to be operated. Over the frequency range of 30 to 1000 MHz, CISPR quasi-peak measurements require a bandwidth setting of 120 kHz while peak or average measurements require a bandwidth setting of 100 kHz.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure radiated EME over the range 30 - 1000 MHz. Search for emissions by tuning the measurement instrument in a continuous manner over this range. While performing the measurements it may be necessary to change bandwidths on the measuring instrument as the area of spectrum examined changes.

Each emission is to be maximized by tuning the EUT or changing the operating channel, varying the mode of operation, varying the position of the interconnect cables, and changing the orientation of the antenna on the EUT, as applicable. The following modes of operation are to be examined for every EUT:

a) The EUT powered on in standby mode.

b) The EUT operating in a typical fashion.

Continue to maximize each emission by rotating the test platform though 360 degrees, raising and lowering the measurement antenna from 1 to 4 meters, changing the orientation of the antenna on the EUT, and again rearranging the interconnecting cables and again changing the orientation of the antenna on the EUT, again rotating the test table 360 degrees. Repeat this process for the other polarity of the measurement antenna i.e. horizontal first, then vertical.

Record the most significant emission levels observed with the measurement antenna in the horizontal polarization for the following frequency ranges: 30 - 88 MHz, 88 - 216 MHz, 216 - 1000 MHz. Repeat this process for the antenna in the vertical polarization. If any of these emission levels exceed the appropriate FCC limits, the device must be redesigned or modified before the equipment can comply with the FCC technical rules.

The field strength limits for intentional radiators which operate under the general requirements are specified in Section 15.209 of the FCC Rules in Appendix 2. Alternatively, intentional radiators may be operated in certain frequency bands in Sections 15.215 to 15.251 of the Rules in Appendix 2 by complying with field strength limits specified therein. Please note that intentional radiators may not be operated on any of the frequency ranges specified in either the note in Section 15.209(a) or Section 15.205 of the Rules in Appendix 2.

Until 3 years after (the effective date of the Report and Order adopting a new test procedure), wireless microphones operating on 88 to 108 MHz and auditory assistance devices operating on 72 to 76 MHz or 88 to 108 MHz that are hand-held or worn on the body are permitted a 4 dB reduction of the measured field strength of the fundamental frequency for purposes of compliance with the rules.

Step 5)

If radiated EME measurements above 1000 MHz are not required as determined in Section 15.33 of the FCC Rules in Appendix 2, proceed to Step 8. If radiated EME measurements above 1000 MHz are required, connect an antenna for measuring emissions above 1000 MHz to the measuring receiver and set it up at the proper distance from the EUT as specified Step 7 of Section 6.2. Set the 6 dB bandwidth of the measuring instrument to at least 1 MHz and the detector function of that unit to the peak mode.

Step 6)

Measure emissions above 1000 MHz up to the maximum measurement frequency for the EUT, using the measurement scheme described in Step 4 above. Record the most significant emission levels observed with the measurement antenna in the horizontal and vertical positions for the frequency ranges 1000 - 2000 MHz, 2000 - 5000 MHz, and 5000 MHz up to the highest frequency examined.

If all of these emission levels comply with the average limit value in Section 15.209 of the FCC Rules in Appendix 2, proceed to Step 8. If any of these emission levels exceed the peak limits which are 20 dB above the average values in Section 15.209 of the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules. If any of these emission levels exceed the average limits but comply with the peak limits, proceed to Step 7.

Step 7)

Set the detector function of the measuring instrument to the average mode and, again using the appropriate antenna and measurement scheme described in Step 4, remeasure only those emissions from Step 6 above which

complied with the peak limits but exceeded the average limits. Record the most significant emission levels observed with the antenna in the horizontal and vertical positions for each particular emission.

If any of these emission levels exceed the average limits, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 8)

Record the data in accordance with the data reporting/recording requirements specified in Section 12.

SECTION III - SPECIAL MEASUREMENTS

The regulations in Sections 15.215-15.251 of the FCC Rules in Appendix 2 provide alternative standards for the operation of intentional radiators in specified frequency bands in lieu of the general radiated limits specified in Section 15.209 of the Rules in Appendix 2. Many of these alternative specifications have specific radiated EME and additional requirements for intentional radiators. The procedures described below are to be used to make the measurements to determine if an intentional radiator complies with these additional requirements.

7 OPERATING FREQUENCY MEASUREMENTS

When the operating frequency is to be measured on an intentional radiators which operate under the alternate provisions of Sections 15.215-15.251 of the Rules in Appendix 2, the procedures described below are to be used. Unless otherwise specified, frequency measurements should be made without any applied modulation. However, if the modulation is internal to the EUT and cannot be easily turned off, or, in the case of single side band transmitters, modulation is necessary to produce an output, frequency measurements are to be made with normal modulation present or with external modulation applied, following the applicable specifications in Section 2.989 of the FCC Rules in Appendix 2.

7.1 Set-up

Step 1)

Place a hand-held or table-top EUT on a non-conducting table 0.8 meters above the ground. Place a floor-standing EUT on the floor in a typical configuration.

Step 2)

Couple the output signal from the EUT antenna to a measuring instrument by placing the measurement antenna near the EUT (*e.g.* 6 inches away).

Alternatively, the EUT antenna may be disconnected and the measuring instrument connected, through a suitable dummy load, to the antenna terminals of the EUT. This alternative method can, in some cases, cause the frequency to vary from that which would be measured with the EUT connected to an antenna.

Step 3)

Supply the EUT with normal AC voltage. If the EUT is battery operated, install a new battery in the EUT.

Step 4)

If the EUT has a channel selector switch, turn the switch to the channel with the lowest output frequency on the device. If the EUT is continuously tunable over a frequency range, tune the device to the lowest frequency of the tuning range.

7.2 Measurement of Operating Frequency

Step 1)

Turn on the EUT. If the measuring instrument is a frequency counter, the operating frequency may be read from the display. If a receiver or spectrum analyzer is used as the measuring instrument, use the technique of signal substitution to determine the operating frequency of the device as follows:

Disconnect the cable from the input on the measuring instrument. Using any convenient length of coaxial cable, connect a signal generator to the input on the measuring instrument. Use the signal generator and its controls to supply the measuring instrument a signal which appears at the same location and level as the operating frequency of the EUT on the measuring instrument. The operating frequency of the EUT may be read from the signal generator indicator or display. Record the operating frequency and the channel to which the device is tuned, if applicable.

Step 2)

Allow the EUT to operate continuously for 5 minutes and repeat the process in Step 1 above.

Step 3)

If the EUT operates on other output frequencies, turn the channel selector switch to the highest output frequency on the device or tune a continuously tunable device to the highest frequency of the tuning range. Repeat the measurement scheme in Steps 1 and 2 above.

Step 4)

If the EUT has more switch-selectable output channels, repeat the process in Steps 1, 2 and 3 for each output frequency.

The operating frequencies obtained during this process are to be compared to the frequency requirements specified in the appropriate Sections of the FCC Rules. If the device does not comply with the pertinent operating frequency specifications in the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 5)

Record the data in accordance with the data reporting/recording requirements specified in Section 12.

8 MEASUREMENT OF OPERATING FREQUENCY WITH VARIATION IN AMBIENT TEMPERATURE

When the change in operating frequency caused by variation of ambient temperature is to be measured on intentional radiators which operate under the alternate provisions of Sections 15.215-15.251 of the Rules in Appendix 2, the procedures described below are to be used.

8.1 Set-up

Step 1)
Place the de-energized EUT inside an environmental test chamber. For devices that are normally operated continuously, the EUT may be turned on while inside the test chamber. For devices that have oscillator heaters, energize only the heater circuit while the EUT is inside the chamber.

Step 2)
Supply the EUT with normal AC voltage. If the EUT is battery operated, install a new battery in the EUT.

Step 3)
If the EUT has a channel selector switch, turn the switch to the channel with the lowest output frequency on the device. If the EUT is continuously tunable over a frequency range, tune the device to the lowest frequency of the tuning range.

Step 4)
Couple the output signal from the EUT antenna to a measuring instrument by placing the measurement antenna inside the environmental chamber near the EUT (e.g. 6 inches away).
Alternatively, the EUT antenna may be disconnected and the measuring instrument connected, through a suitable dummy load, to the antenna terminals of the EUT. This alternative method can, in some cases, cause the frequency to vary from that which would be measured with the EUT connected to an antenna.

Step 5)
Set the temperature control on the chamber to -20 degrees centigrade and allow the temperature inside the chamber to stabilize at the set temperature for 30 minutes before starting frequency measurements.

8.2 Measurement of Operating Frequency with Variation in Ambient Temperature

Step 1)
After 30 minutes at the set temperature, turn on the EUT and leave it on for the remainder of these measurements at the set temperature.

Step 2)
If the measuring instrument is a frequency counter, the operating frequency may be read from the display. If a receiver or spectrum analyzer is used as the measuring instrument, use the technique of signal substitution to determine the operating frequency of the device (See Step 1 of Section 7.2). Record the operating frequency and the channel to which the device is tuned, if applicable.

Step 3)
While maintaining a constant temperature inside the environmental chamber, repeat Step 2 at two, five, and ten minute intervals after the EUT is energized.

Step 4)
If the EUT operates on other output frequencies or is continuously tunable, turn the device off. Turn the channel selector switch to the next highest channel or tune a continuously tunable device to the opposite end of its operating frequency range. Close the chamber door and allow the temperature inside to stabilize for 15 minutes before proceeding.

Step 5)
Repeat the operating frequency measurement procedure in Steps 1 through 3 above. If the EUT has more switch-selectable output channels, repeat the process in Steps 1 through 4 for each output frequency, being sure to allow the temperature inside the environmental test chamber to stabilize for 15 minutes before making operating frequency measurements.

Step 6)
After all measurements have been made at -20 degrees centigrade, turn the EUT off. Reset the temperature control on the test chamber to +50 degrees centigrade. Repeat the above measurement process for the EUT.
The operating frequencies obtained during this process are to be compared to the frequency requirements specified in the appropriate Sections of the FCC Rules. If the device does not comply with the pertinent operating frequency specifications in the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 7)
Record the data in accordance with the data reporting/recording requirements specified in Section 12.

9 MEASUREMENT OF OPERATING FREQUENCY WITH VARIATION IN PRIMARY SUPPLY VOLTAGE
When the change in operating frequency caused by variation in primary supply voltage is to be measured on intentional radiators which operate under the alternate provisions of Sections 15.215-15.251 of the Rules in Appendix 2, the procedures described below are to be used.

9.1 Set-up

Step 1)
Place the de-energized EUT inside an environmental test chamber. For devices that are normally operated continuously, the EUT may be turned on while inside the test chamber. For devices that have oscillator heaters, energize only the heater circuit while the EUT is inside the chamber.

Step 2)
If the EUT has a channel selector switch, turn the switch to the channel with the lowest output frequency on the device. If the EUT is continuously tunable over a frequency range, tune the device to the lowest frequency of the tuning range.

Step 3)
Couple the output signal from the EUT antenna to a measuring instrument by placing the measurement antenna inside the environmental chamber near the EUT (e.g. 6 inches).

Alternatively, the EUT antenna may be disconnected and the measuring instrument connected, through a suitable dummy load, to the antenna terminals of the EUT. This alternative method can, in some cases, cause the frequency to vary from that which would be measured with the EUT connected to an antenna.

Step 4)
Supply the EUT with 85 % of the nominal AC voltage for the first set of operating frequency measurements. If the EUT is battery operated, install a new battery in the EUT to perform these measurements.

Step 5)
Set the temperature control on the chamber to +20 degrees centigrade and allow the temperature inside the chamber to stabilize at the set temperature for 30 minutes before starting frequency measurements.

9.2 Measurement of Operating Frequency with Variation in Primary Supply Voltage

Step 1)
After 30 minutes at the set temperature, turn on the EUT and allow it to achieve its normal operating temperature, typically 5 minutes or less, before continuing.

Step 2)
After the device has reached operating temperature, determine the operating frequency of the EUT. If a receiver or spectrum analyzer is used as the measuring instrument, use the technique of signal substitution to determine the operating frequency of the device (See Step 1 of Section 7.2). Record the operating frequency and the channel to which the device is tuned, if applicable.

Step 3)
If the EUT operates on other output frequencies or is continuously tunable, turn the device off. Turn the channel selector switch to the next highest channel or tune a continuously tunable device to the opposite end of its operating frequency range. Close the chamber door and allow the temperature inside to stabilize for 15 minutes before proceeding.

Step 4)
After 15 minutes, repeat the operating frequency measurement procedure in Steps 1 through 3 above. If the EUT has more switch-selectable output channels, repeat the measurement process in Steps 1 through 4 for each output frequency, being sure to allow the temperature inside the environmental test chamber to stabilize for 15 minutes before making operating frequency measurements.

Step 5)
Supply the EUT with 115 % of the nominal AC voltage for the next set of operating frequency measurements. If the EUT is battery operated, use the same battery which was installed at the beginning of this test.

Step 6)
After the temperature inside the chamber has stabilized, repeat the above measurement process for the EUT.

The operating frequencies obtained during this process are to be compared to the frequency requirements specified in the appropriate Sections of the FCC Rules. If the device does not comply with the pertinent operating frequency specifications in the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 7)
Record the data in accordance with the data reporting/recording requirements specified in Section 12.

10 BANDWIDTH MEASUREMENTS

When the bandwidth is to be measured on an intentional radiator which operates under the alternate provisions of Sections 15.215-15.251 of the Rules in Appendix 2, the procedures described below are to be used.

10.1 Set-up

Step 1)
Place a hand-held or table-top EUT on a non-conducting table 0.8 meters above the ground. Place a floor-standing EUT on the floor in a typical configuration.

Step 2)
Couple the output signal from the EUT antenna to a measuring instrument by connecting a measurement antenna to the instrument input with a suitable length of coaxial cable and placing the measurement antenna near the EUT (e.g. 6 inches away).

> Note: A spectrum analyzer is the recommended measuring instrument.

Alternatively, the EUT antenna may be disconnected and the output of the EUT final RF stage coupled, through a suitable dummy load, to the measuring instrument for these measurements. This alternative method can, in some cases, cause the frequency and bandwidth to vary from that which would be measured with the EUT connected to an antenna.

Step 3)
Supply the EUT with normal AC voltage. If the EUT is battery operated, install a new battery in the EUT.

Step 4)
If the EUT has a channel selector switch, turn the switch to the channel with the lowest output frequency on the device. If the EUT is continuously tunable over a frequency range, tune the device to one extreme of the tuning range.

Step 5)
Turn on the EUT and allow it to warm up to normal operating temperature, typically 5 minutes or less, before proceeding with this test.

Step 6)
Supply the EUT with a typical signal to modulate the output signal.

For an EUT operating with internal modulation, apply this modulation to the output signal.

For voice-modulated devices equipped with a built-in microphone, place a speaker approximately 4 inches away from the EUT microphone. Apply a 1,000 hertz tone to the speaker using an audio signal generator and an impedance matching transformer, if necessary.

For an EUT which accepts external modulation through an input connector, apply typical modulation to the EUT at the maximum rated input level for the device (e.g. apply a 1000 Hz tone to an input for an external microphone).

Step 7)

Set the scan width per division of the spectrum analyzer display to 20 kHz per division. Set the bandwidth of the spectrum analyzer display to 100 kHz.

10.2 Measurement of Bandwidth

Step 1)

Locate the output signal of the device on the measurement instrument. Verify that a continuously tunable EUT is tuned to the upper or lower extreme of frequency travel by varying the tuning control on the EUT and observing the direction of frequency change on the measuring instrument.

Step 2)

Disconnect or turn off the modulating signal being sent to the EUT and center the unmodulated output signal of the EUT on the analyzer display using the frequency adjustment on the measuring instrument.

Step 3)

Adjust the analyzer reference level and display adjust controls to set the level of the unmodulated output signal to a point 26 dB above the horizontal center line on the display screen of the spectrum analyzer.

Note: Care must be taken not to change the orientation of the EUT during this measurement because this may affect the coupling to the measurement instrument and thereby change the reference level and the bandwidth.

Step 4)

Reconnect or turn on the modulating signal supplied to the EUT. For voice-modulated devices, adjust the volume of the audio tone to maximize the width of the modulated output signal at the horizontal center line.

Step 5)

Determine the bandwidth occupied by the modulated output signal on the display of the spectrum analyzer at the horizontal center line.

Note: If the modulated output signal at the horizontal center line is off screen, readjust the scan width per division to a higher setting (e.g. 50 kHz) so the complete modulated output signal is on screen at the horizontal center line.

Step 6)

Record the bandwidth of the modulated output signal and the output channel or frequency of the EUT.

Step 7)

Using signal substitution (See Step 1 of Section 7.2), determine both frequencies (one above and one below the frequency of the unmodulated output signal) where the modulated output signal is 26 dB below the unmodulated output signal level. Record these frequencies.

Step 8)

If the EUT operates from more than one source of modulation, the bandwidth is to be remeasured with each source of modulation separately applied. Connect the alternate source of modulation to the EUT and repeat Steps 2 through 7 for each alternate source of modulation for the EUT.

Step 9)

If the EUT operates on other output channels or is continuously tunable over a range of frequencies, turn the switch on a device with a switch selectable output to the next highest channel or tune a continuously tunable device to the opposite end of its operating frequency range. Repeat the measurement process from Step 5 of Section 10.1 to Step 8 of Section 10.2.

The bandwidths obtained during this measurement are to be compared to the bandwidths specified in the appropriate Section of the Rules. If the device does not operate within the bandwidth specified in the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules.

In addition, the frequencies measured at the edge of the bandwidth must be compared to the operating frequency range for the EUT that is specified in the appropriate Section of the FCC Rules. If these frequencies do not remain in the operating frequency range permitted for the EUT as specified in the Rules, the device must be redesigned or modified before it can comply the FCC technical rules.

Step 10)

Record the data in accordance with the data reporting/recording requirements specified in Section 12.

11 INPUT POWER MEASUREMENTS

Certain intentional radiators that operate under the alternate conditions specified in Section 15.215 to 15.251 of the FCC Rules in Appendix 2 require measurement of total input power to the device at the battery or AC power line terminals. Total input power to such devices is to be measured in accordance with the procedures described below.

11.1 Set-up

Step 1)

Place a hand-held or table-top EUT on a non-conducting table 0.8 meters above the ground. Place a floor-standing EUT on the floor in a typical configuration.

Step 2)

Connect a voltmeter to the battery or AC terminals providing the EUT with power.

Step 3)
Supply the EUT with normal AC voltage. If the EUT is battery operated, install a new battery in the EUT.

Step 4)
If the EUT has a channel selector switch, turn the switch to the channel with the lowest output frequency on the device. If the EUT is continuously tunable over a frequency range, tune the device to one extreme of the tuning range.

Step 5)
Turn on the EUT and allow it to warm up to normal operating temperature, typically 5 minutes or less, before proceeding with this test.

Step 6)
Supply the EUT with a typical signal to modulate the output signal.

For an EUT operating with internal modulation, apply this modulation to the output signal.

For voice-modulated devices equipped with a built-in microphone, place a speaker approximately 4 inches away from the EUT microphone input. Apply a 1,000 hertz tone to the speaker using an audio signal generator and an impedance matching transformer, if necessary.

For an EUT which accepts external modulation through an input connector, apply typical modulation to the EUT at the maximum rated input level for the device (e.g. apply a 1000 Hz tone to an input for an external microphone).

11.2 Measurement of Input Power

Step 1)
Measure and record the voltage at the battery or AC terminals with the EUT operating normally.

Step 2)
Turn the EUT off and disconnect it from the battery or AC power source. Remove the voltmeter from the battery or AC terminals.

Step 3)
Connect an ammeter in series with one of the current-carrying conductors on the EUT and one of the battery or AC power line terminals. Connect the other current-carrying conductor in the EUT to the other side of the battery or AC power line. If the device is powered through the AC power lines, be sure that the EUT is properly grounded.

Step 4)
Turn on the EUT and allow it to warm up to normal operating temperature, typically 5 minutes or less

Step 5)
Supply the EUT with typical modulation as described in Step 4 above.

Step 6)
Measure and record the current that the EUT requires to operate normally.

Step 7)
The total input power is the result of the voltage measured in Step 1 multiplied by the current measured in Step 6.

Step 8)
If the EUT operates from more than one source of modulation, the total input power is to be remeasured with each source of modulation separately applied. Connect the alternate source of modulation to the EUT and repeat the above procedure for each alternate source of modulation for the EUT.

The input power measurements obtained during this process are to be compared to the total input power limits specified in the appropriate Section of the FCC Rules. If the device does not comply with the total input power limits specified in the Rules, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 9)
Record the data in accordance with the data reporting/recording requirements specified in Section 12.

12 DATA REPORTING/RECORDING REQUIREMENTS

12.1 The Test Report

The test report for an intentional radiator is to contain the following information:

1) The location and identification of the test sites used for the line conducted and radiated measurements and whether these sites were laboratory facilities or on-site locations.

2) Identification and description, including input impedance, of the instrumentation and equipment used to perform the tests. This is to include identification of the type of antenna(s) used for measuring radiated emissions.

3) Specific identification, including the FCC ID's if applicable, of the EUT and, in the case of multi-component systems, all equipment used in the system with the EUT.

4) Descriptions of the length and construction of each EUT system cable. The report is to indicate whether cables are shielded or unshielded, have plastic or metallic hoods, have ferrite beading, etc.

5) Photographs or diagrams of the positions of the equipment on the test table in both the conducted and radiated EME tests.

6) A description of any alternative methods used in the testing, in accordance with the specifications in Section 12.4.

7) The test results and associated comparative information presented in accordance with the specifications in Sections 12.2 and 12.3.

8) A description of any modifications made to the EUT or other system components during the testing.

9) The party who performed the tests.

10) The date the tests were performed.

11) A statement signed by the individual responsible for the test that the EUT as tested complies or does not comply with the applicable FCC rules.

12) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Note: In the case of devices required to be certificated, refer also to Part 2 and Part 15 of the FCC rules for general information requirements pertaining to all applications for certification.

12.2 Recorded Measurements

The 6 highest emissions measured on each conductor of the EUT power cord in the line conducted EME tests are to be recorded in the test report. The highest radiated EME observed with the measurement antenna(s) in the horizontal and vertical planes in each of the following frequency ranges 30-88 MHz, 88-216 MHz, 216-1000 MHz, 1000-2000 MHz, 2000-5000 MHz, 5000-40000 MHz are to be recorded in the test report for each operating frequency measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2.

Measurements of operating frequency are to be recorded in the test report for each intentional radiator operating frequency measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2. Measurements of operating frequency with variation in ambient temperature are to be recorded in the test report for each intentional radiator operating frequency measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2 at -20 and +50 degrees centigrade. Measurements of operating frequency with variation in primary voltage are to be recorded in the test report for each intentional radiator operating frequency measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2 at 85 % and 115 % nominal AC voltage or new battery voltage if the intentional radiator is battery operated. Measurements of bandwidth are to be recorded in the test report for each intentional radiator operating frequency measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2 with each modulation source independently applied. Input power measurements of an intentional radiator are to recorded in the test report for any single convenient operating frequency.

The report is also to contain diagrams or photographs of both the radiated and line conducted EME measurement test set-ups clearly showing the EUT system configuration and the interconnecting cables.

The measurement results and the FCC limits, as appropriate, are to be presented in tabular form for comparison purposes. If a graphic presentation of the data is available, i.e. a plot from a spectrum analyzer, it should be incorporated into the test report also.

12.3 Units of Measurement

Measurements of line conducted EME are to be reported in units of microvolts or dB referenced to one microvolt (dBuV). Measurements of radiated EME are to be reported in units of microvolts per meter (uV/m) or dB referenced to 1 microvolt per meter (dBuV/m) at the distance specified in the FCC rules. Measurements of operating frequency, operating frequency with variation in ambient temperature and primary voltage, and bandwidth are to be reported in units of hertz or multiples thereof (e.g. kilohertz (kHz), megahertz (MHz), or gigahertz (GHz)), as appropriate. Measurements of input power are to be reported in units of watts.

The indicated readings on the measuring instrument are to be converted to microvolts, dBuV, uV/m or dBuV/m by use of appropriate conversion factors. These factors may include antenna factor, amplifier gain, balun loss, impedance transformation loss, etc. and must be given if they are part of the final recorded values. All formulas of conversions and conversion factors are to be included and explained in the measurement report. Radiated measurements taken at alternative distances are to be converted to the limit distance using the relationship specified in Section 15.31(f) of the FCC Rules in Appendix 2.

12.4 Description of Alternate Methods and/or Conditions Used

If an alternate test method is used, the test report must identify and describe that method, provide justification for its use, and describe how the results obtained through its use correlate with the methods specified herein. Instrumentation, instrument attenuator and bandwidth settings, detector function, EUT arrangement, and all other pertinent details of the test are to be provided. Where automatic scan techniques are used, an explanation of how each emission from the EUT was maximized and the scan rate used to obtain each recorded emission is to be included in the test report.

REFERENCES

The following shall form a part of this procedure to the extent applicable:

[1] FCC/OET Bulletin 55, "Characteristics of Open Field Test Sites".*

[2] American National Standard Specifications for Electromagnetic Interference and Field Strength Instrumentation 10 kHz to 40 GHz, ANSI C63.2 (1987).

[3] International Special Committee on Radio Interference (CISPR) Publication 16 - CISPR specification for radio interference measuring apparatus and measurement methods, 1987, 2nd edition.

[4] Parts 2 and 15 of FCC Rules and Regulations (47 CFR Part 2 and 15).

[5] FCC/OET Bulletin 62, "Understanding FCC Rules for Digital Devices".*

* Copies of these documents are available from the FCC Consumer Assistance and Small Business Division, 1919 M Street., N.W., Washington, D.C. 20554.

FIGURES

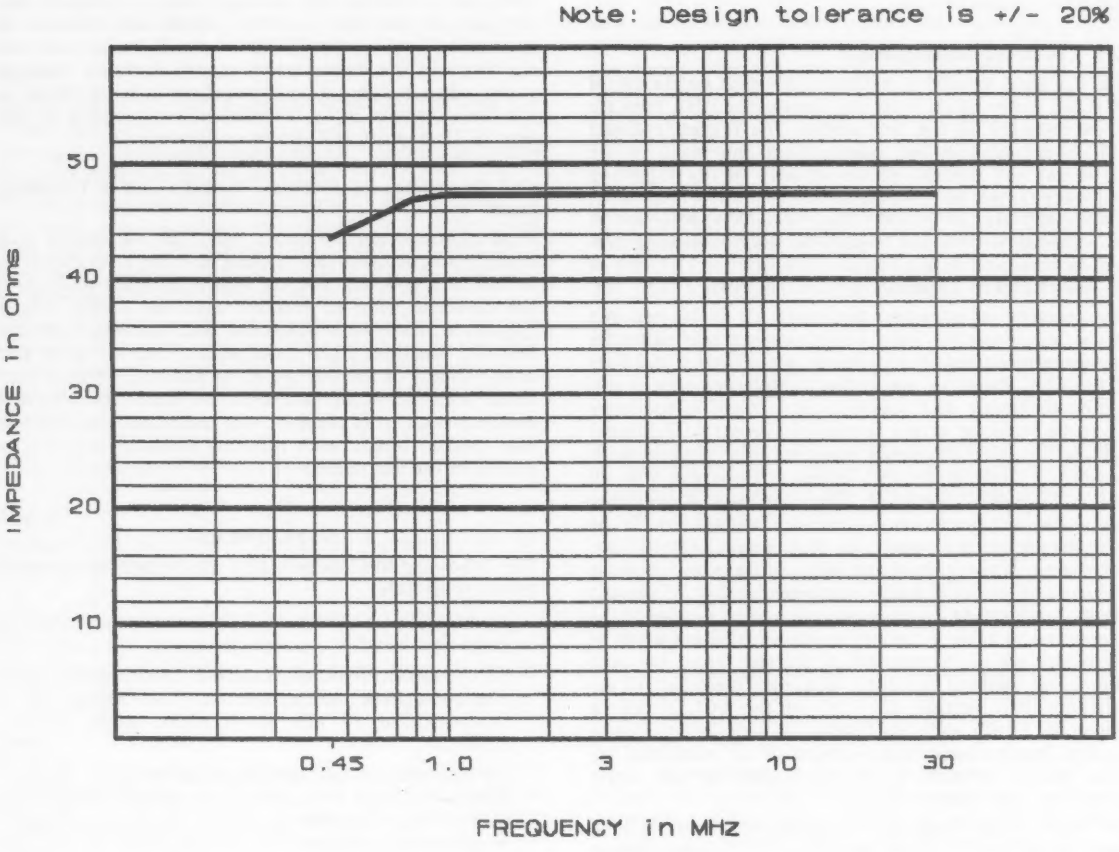

Figure 1 - Impedance Characteristics of 50 uH/ 50 ohm LISN

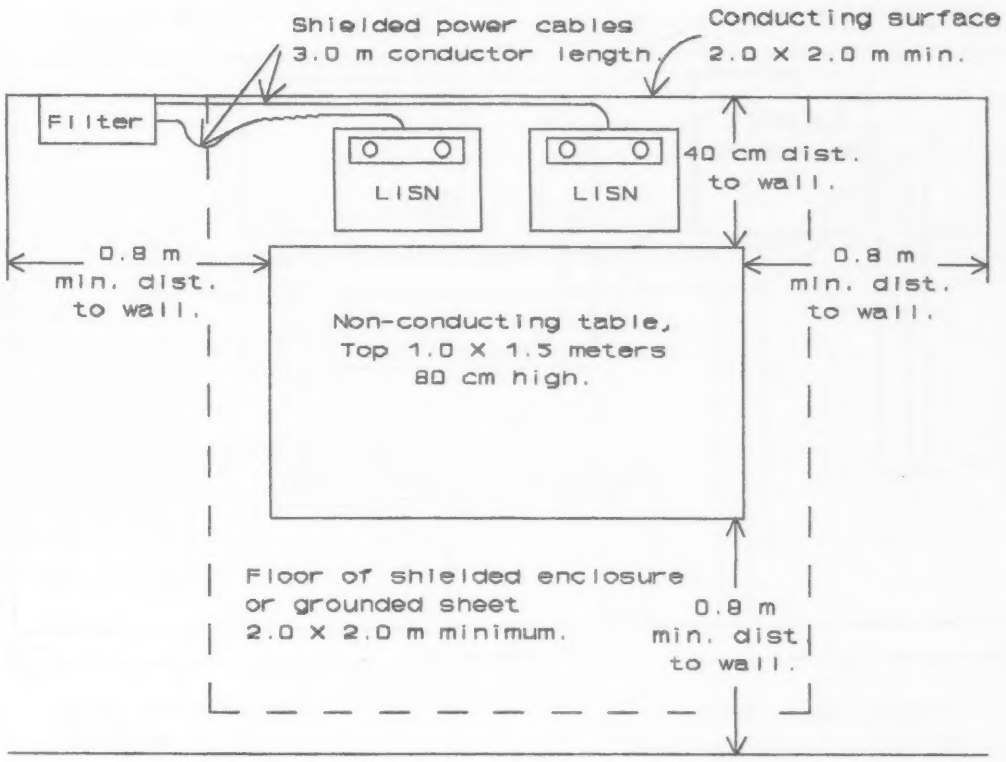

Figure 2 - Line Conducted Test Configuration for Table-top Equipment

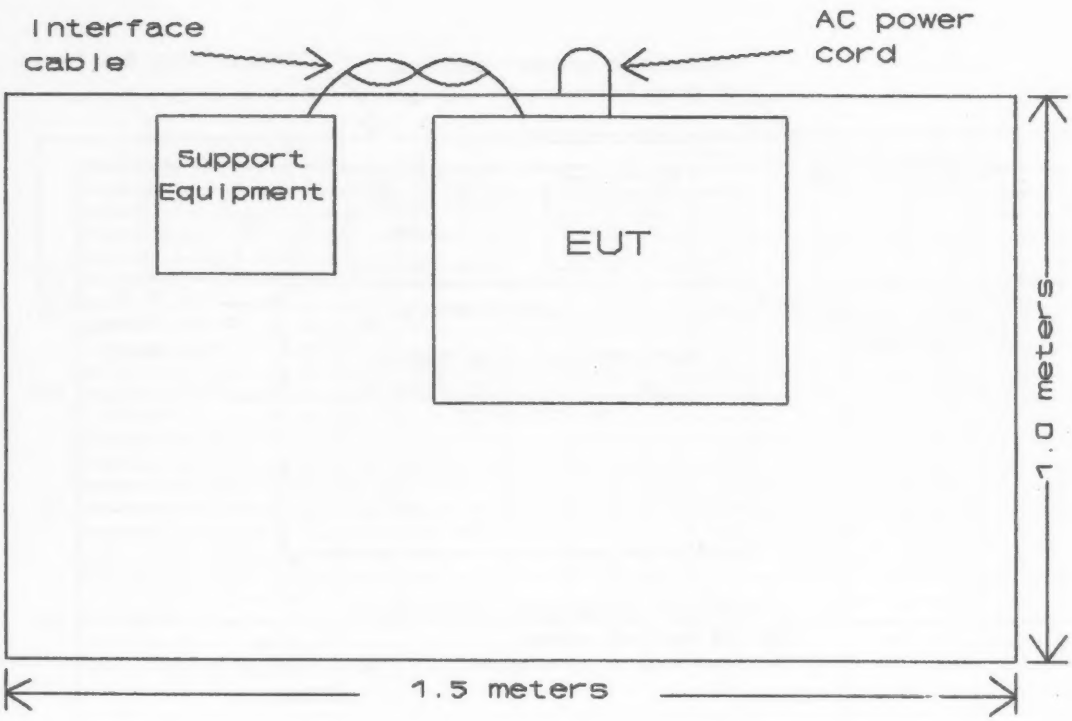

Figure 3 - Line Conducted Testing of Table-top Equipment

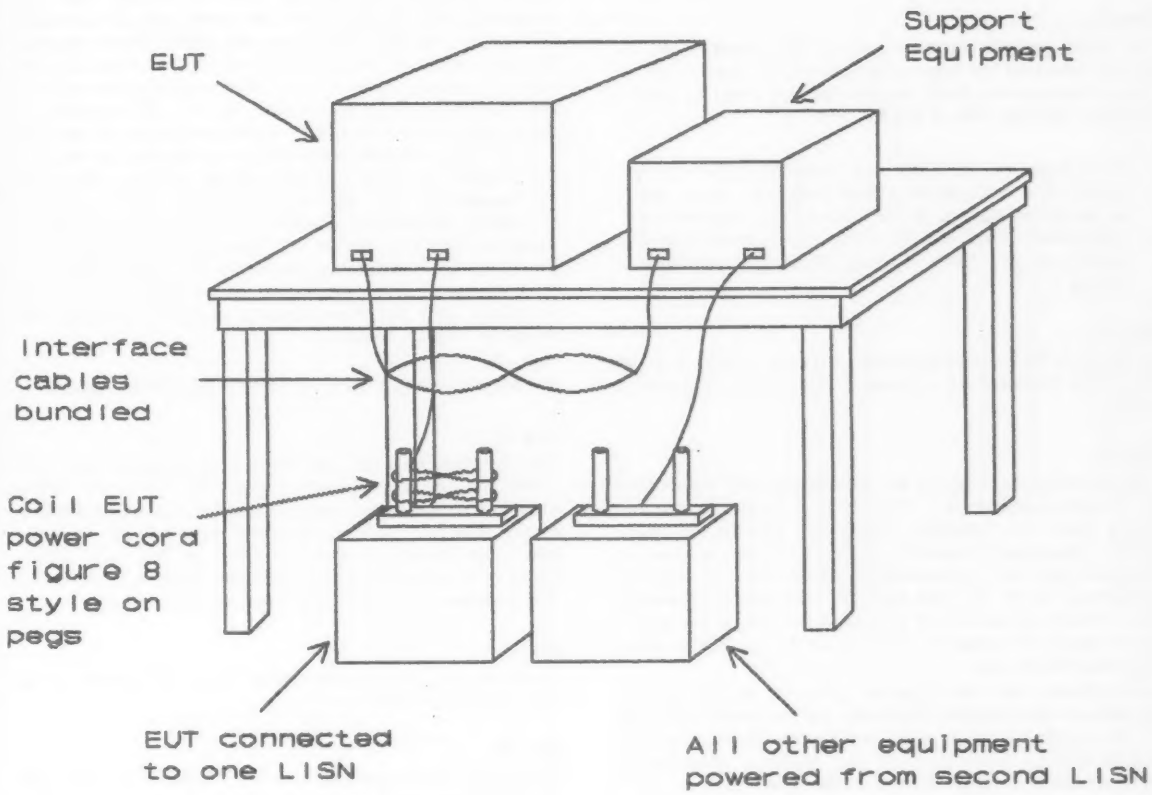
EUT
Support Equipment
Interface cables bundled
Coil EUT power cord figure 8 style on pegs
EUT connected to one LISN
All other equipment powered from second LISN

Figure 4 - Test Platform for Testing Table-top Equipment

APPENDIX 1 - Procedure for Checking Line Impedance Stabilization Networks

The impedance and isolation of each line impedance stabilization network (LISN) section is to be measured at least once a year using the following procedures:

1 MEASURING THE IMPEDANCE OF A LISN

Step 1)

This measurement is to be made with the LISN installed for measuring the line conducted EME of any device.

Step 2)

To avoid possible introduction of AC power from the supply line into the measuring instrument, disconnect the power connections (both neutral and hot lines) to the test set-up at the line side of the RF filter.

Note: Since the RF filter will isolate the LISN from power line impedance effects that can cause the apparent impedance of the LISN to vary beyond the acceptable limits, the RF filter should remain connected to the LISN during impedance measurements.

Step 3)

Connect a 50 ohm termination to every coaxial port on the LISN provided for connection to a measuring instrument.

Step 4)

The preferred instrument for measuring LISN impedance is a vector impedance meter that can be tuned continuously over the frequency range 450 kHz to 30 MHz. Other impedance measuring instruments may be used as long as they are continuously tunable over the required frequency range. If other types of impedance measuring instruments are used, it is acceptable to modify the procedure described herein as appropriate to suit the measuring instrument used.

Instruments that are capable only of measuring the impedance at a selected frequency (i.e. an instrument that is not continuously tunable) are not acceptable for these measurements since they do not facilitate detection of resonances at all frequencies over the specified range.

Using an adapter with short connections such as that shown in Photo 1, connect the measuring instrument directly to one terminal of the AC outlet on the load side of the LISN normally used to supply power to the EUT or peripheral, and measure the impedance of that side of the LISN, tuning the instrument over the frequency range between 450 kHz and 30 MHz so as to detect any impedance variations that may be due to resonances or other imperfections.

Step 5)

Plot the measured impedance curve for comparison with the tolerances shown in Figure 1 of this test procedure. If any measured value exceeds the permissible error tolerance, the LISN must be modified to reduce the error to an acceptable level.

Step 6)

Repeat steps 4 and 5 with the measuring instrument connected to the other terminal of the AC outlet on the LISN used to supply power to the EUT or peripheral.

Step 7)

If the LISN has three current carrying terminals on the AC outlet, repeat steps 4 and 5 for the third terminal.

Step 8)

If the LISN inductors have magnetic materials in their construction, make the following additional tests with AC current applied through the LISN to ensure that any variability due to effects of line current can be detected. Disconnect the RF filter from the LISN. Short together the load terminals of the LISN and feed current into the supply terminals from a low voltage transformer of suitable current rating (See Figure A). An AC ammeter in series with the circuit can be used to measure the applied current and a variable transformer can be used to regulate the amount of current by varying the primary voltage of the transformer. The high current circuit should not have a ground connection. Connect the measurement instrument as shown in Figure A. Measure the impedance of the LISN while supplying current at the LISNs maximum current rating. The impedance values measured by this technique will be approximately one-half of those observed in steps 5, 6, and 7.

2 MEASURING THE ISOLATION BETWEEN LISNs

Step 1)

The isolation between the AC supply ports of the EUT LISN and the corresponding ports of the other LISNs used in line conducted measurements must be checked to ensure that the EME entering the second LISN does not affect the measured levels of EME at the EUT LISN. Begin this procedure by performing steps 1, 2, and 3 of the impedance measurement procedure in 1 above.

Step 2)

Leave the RF filter disconnected from AC power at the line side of the filter.

Step 3)

Connect a signal generator to one terminal of the LISN port used to supply current to the EUT using an adaptor similar to that shown in Photo 1.

Step 4)

Using the same type of adapter, connect the measuring equipment to the corresponding AC supply port on the second LISN.

Step 5)

Measure the signal levels at the second LISN over the range 450 kHz to 30 MHz. The signal levels so measured at the second LISN should be at least 40 dB below the signal levels supplied to the EUT LISN.

Step 6)

Repeat Steps 4 and 5 for the corresponding AC supply ports on all LISNs used in line conducted measurements at the test facility.

Step 7)
Repeat Steps 3, 4, 5, and 6 for all current carrying terminals on the AC outlet of the EUT LISN.

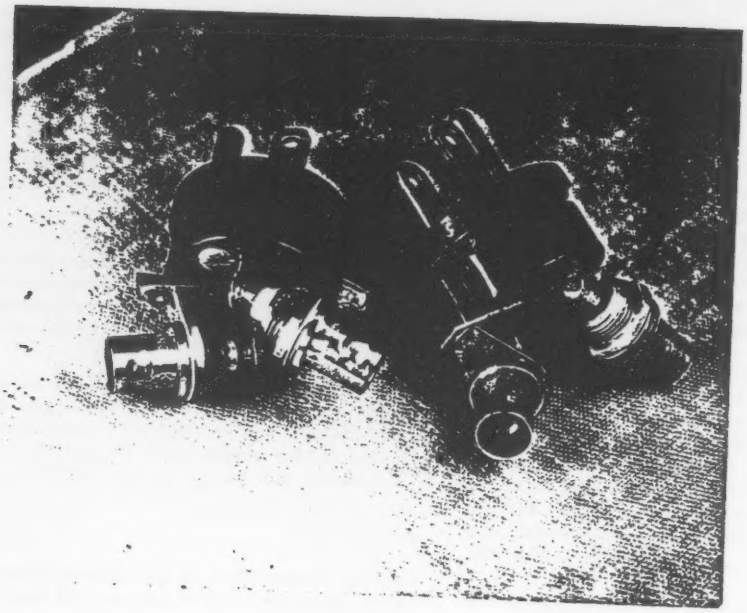

Photo 1

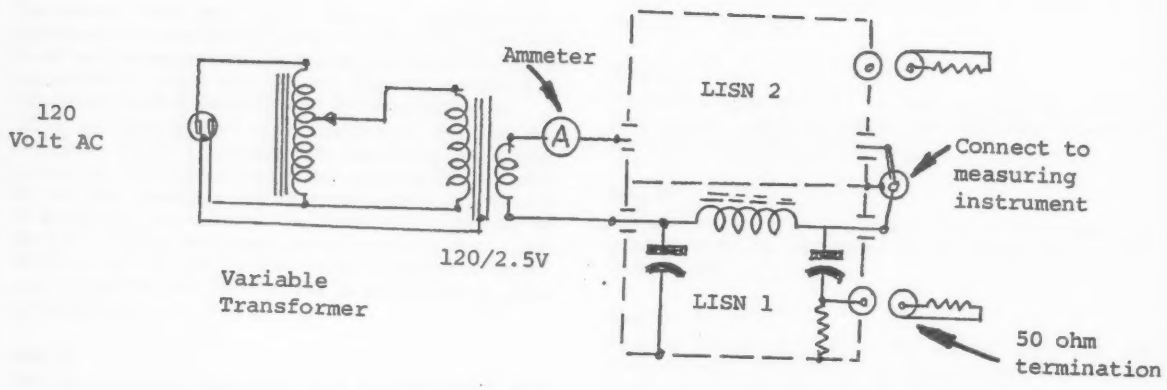

Figure A

APPENDIX 2 -Extract of FCC Part 15 Technical Rules for Intentional Radiators.

Part 15 Subpart A - General

Section 15.31 Measurement standards.

(f) To the extent practicable, the device under test shall be measured at the distance specified in the appropriate rule section. The distance specified corresponds to the horizontal distance between the measurement antenna and the closest point of the equipment under test, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system containing the equipment under test. The equipment under test, support equipment and any interconnecting cables shall be included within this boundary.

(1) At frequencies equal to or above 30 MHz, measurements may be performed at a distance closer than that specified provided this does not result in measurements taken in the near field. When performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance using an inverse linear distance extrapolation factor (20 dB/decade). Measurement at a distance greater than specified is not permitted unless the responsible party can demonstrate that measurements at the specified distance are impractical because of the size of the equipment, the location of the equipment, or other factors, or unless the responsible party can demonstrate that such a measurement would take place in the near field, as could occur when performing measurements on some large digital devices and perimeter protection systems. Measurements shall not be performed at a distance greater than 30 meters unless it can be demonstrated that measurement at a distance of 30 meters or less is impracticable and, further, that the signal level needed to be determined at the distance employed can be detected by the measuring equipment. When performing measurements at a distance greater than that specified, the results shall be interpolated to the specified distance using an inverse linear distance interpolation factor (20 dB/decade).

(2) At frequencies below 30 MHz, measurements may be performed at a distance closer than that specified in the regulations; however, an attempt should be made to avoid making measurements in the near field. Pending the development of an appropriate measurement procedure for measurements performed below 30 MHz, when performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance by either making measurements at a minimum of two distances on at least one radial to determine the proper extrapolation factor or by using the square of an inverse linear distance extrapolation factor (40 dB/decade).

(3) The applicant for a grant of certification shall specify the interpolation or extrapolation method used in the application filed with the Commission. For equipment subject to notification or verification, this information shall be retained with the measurement data.

(4) When measurement distances of 30 meters or less are specified in the regulations, the Commission will test the equipment at the distance specified unless measurement at that distance results in measurements being performed in the near field. When measurement distances of greater than 30 meters are specified in the regulations, the Commission will test the equipment at a closer distance, usually 30 meters, extrapolating the measured field strength to the specified distance using the methods shown in this Section.

(5) Measurements shall be performed at a sufficient number of radials around the equipment under test to determine the radial at which the field strength values of the radiated emissions are maximized. The maximum field strength at the frequency being measured shall be reported in an application for certification.

(g) Equipment under test shall be adjusted, using those controls that are readily accessible to or are intended to be accessible to the consumer, in such a manner as to maximize the level of the emissions. For those devices to which wire leads may be attached by the consumer, tests shall be performed with wire leads attached. The wire leads shall be of the length to be used with the equipment if that length is known. Otherwise, wire leads one meter in length shall be attached to the equipment. Longer wire leads may be employed if necessary to interconnect to associated peripherals.

(m) Measurements on intentional radiators or receivers, other than TV broadcast receivers, shall be performed and, if required, reported for each band in which the device can be operated with the device operating at the number of frequencies in each band specified in the following table:

Frequency range over which device operates	Number of frequencies	Location in the range of operation
1 MHz or less	1	Middle
1 to 10 MHz	2	1 near top and 1 near bottom
More than 10 MHz	3	1 near top, 1 near middle and 1 near bottom

Section 15.33 Frequency range of radiated measurements.

(a) For an intentional radiator, the spectrum shall be investigated from the lowest radio frequency signal generated in the device, without going below 9 kHz, up to at least the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower. If the intentional radiator contains a digital device, regardless of whether this digital device controls the functions of the intentional radiator or the digital device is used for additional control or function purposes other than to enable the operation of the intentional radiator, the frequency range shall be investigated up to the higher of the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator or the upper frequency of the measurement range applicable to the digital device, as shown in paragraph (b)(1) of this Section.

(b) For unintentional radiators:

(1) Except as otherwise indicated in paragraphs (b)(2) or (b)(3), for an unintentional radiator, including a digital device, the spectrum shall be investigated from the lowest radio frequency signal generated or used in the device, without going below the lowest frequency for which a radiated emission limit is specified, up to the frequency shown in the following table:

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 108	1000
108 - 500	2000
500 - 1000	5000
Above 1000	5th harmonic of the highest frequency or 40 GHz, whichever is lower.

(2) A unintentional radiator, excluding a digital device, in which the highest frequency generated in the device, the highest frequency used in the device and the highest frequency on which the device operates or tunes are less than 30 MHz and which, in accordance with Section 15.109, is required to comply with standards on the level of radiated emissions within the frequency range 9 kHz to 30 MHz, such as a CB receiver or a device designed to conduct its radio frequency emissions via connecting wires or cables, e.g., a carrier current system not intended to radiate, shall be investigated from the lowest radio frequency generated or used in the device, without going below 9 kHz (25 MHz for CB receivers), up to the frequency shown in the following table. If the unintentional radiator contains a digital device, the upper frequency to be investigated shall be that shown in the table below or in the table in paragraph (b)(1) above, as based on both the highest frequency generated and the highest frequency used in the digital device, whichever range is higher.

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 10	400
10 - 30	500

(3) Except for a CB receiver, a receiver employing superheterodyne techniques shall be investigated from 30 MHz up to at least the second harmonic of the highest local oscillator frequency generated in the device. If such receiver is controlled by a digital device, the frequency range shall be investigated up to the higher of the second harmonic of the highest local oscillator frequency generated in the device or the upper frequency of the measurement range specified for the digital device in paragraph (b)(1) of this Section.

(c) The above specified frequency ranges of measurements apply to the measurement of radiated emissions and, in the case of receivers, the measurement to demonstrate compliance with the antenna conduction limits specified in Section 15.111. The frequency range of measurements for AC power line conducted limits is specified in Sections 15.107 and 15.207 and applies to all equipment subject to those regulations. In some cases, depending on the frequency(ies) generated and used by the equipment, only signals conducted onto the AC power lines are required to be measured.

(d) Particular attention should be paid to harmonics and subharmonics of the fundamental frequency as well as to those frequencies removed from the fundamental by multiples of the oscillator frequency. Radiation at the frequencies of multiplier stages should also be checked.

Section 15.35 Emission limits.

The conducted and radiated emission limits shown in this Part are based on the following, unless otherwise specified elsewhere in this Part:

(a) On any frequency or frequencies below or equal to 1000 MHz, the limits shown are based on measuring equipment employing a CISPR quasi-peak detector function and related measurement bandwidths, unless otherwise specified. The specifications for the measuring instrument using the CISPR quasi-peak detector can be found in Publication 16 of the International Special Committee on Radio Interference (CISPR) of the International Electrotechnical Commission. As an alternative to CISPR quasi-peak measurements, the responsible party, at its option, may demonstrate compliance with the emission limits using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, as long as the same bandwidths as indicated for CISPR quasi-peak measurements are employed.

Note: For pulse modulated devices with a pulse-repetition frequency of 20 Hz or less and for which CISPR quasi-peak measurements are specified, compliance with the regulations shall be demonstrated using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, using the same measurement bandwidths that are indicated for CISPR quasi-peak measurements.

(b) On any frequency or frequencies above 1000 MHz, the radiated limits shown are based on the use of measurement instrumentation employing an average detector function. When average radiated emission measurements are specified in the regulations, including emission measurements below 1000 MHz, there is also a limit on the radio frequency emissions, as measured using instrumentation with a peak detector function, corresponding to 20 dB above the maximum permitted average limit for the frequency being investigated. Measurements of AC power line conducted emissions are performed using a CISPR quasi-peak detector, even for devices for which average radiated emission measurements are specified.

(c) When the radiated emission limits are expressed in terms of the average value of the emission, and pulsed operation is employed, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative (provided the transmitter operates for longer than 0.1 seconds) or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the average absolute voltage during a 0.1 second interval during which the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for certification or shall be retained in the measurement data file for equipment subject to notification or verification.

Section 15.37 Transition provisions for compliance with the rules.

Equipment may be authorized, manufactured and imported under the rules in effect prior to (insert date 60 days after date of publication in the Federal Register) in accordance with the following schedules:

(a) For all intentional and unintentional radiators, except for receivers: Radio frequency equipment verified by the responsible party or for which an application for a grant of equipment authorization is submitted to the Commission on or after (insert date 3 years after effective date of the R&O) shall comply with the regulations specified in this Part. Radio frequency equipment that is manufactured or imported on or after (insert date 5 years after effective date of the R&O) shall comply with the regulations specified in this Part.

(b) For receivers: Receivers subject to the regulations in this Part that are manufactured or imported on or after (insert date 10 years after effective date of the R&O) shall comply with the regulations specified in this Part. However, if a receiver is associated with a transmitter that could not have been authorized under the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register), e.g., a transmitter operating under the provisions of Sections 15.209 or 15.249 (below 960 MHz), the transition provisions in this Section do not apply. Such receivers must comply with the regulations in this Part.

(c) There are no restrictions on the operation or marketing of equipment complying with the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register).

Subpart C - Intentional Radiators

Section 15.205 Restricted bands of operation.

(a) Except as shown in paragraph (d), only spurious emissions are permitted in any of the frequency bands listed below:

MHz	MHz	MHz	GHz
0.090 - 0.110	162.0125 - 167.17	2310 - 2390	9.3 - 9.5
0.49 - 0.51	167.72 - 173.2	2483.5 - 2500	10.6 - 12.7
2.1735 - 2.1905	240 - 285	2655 - 2900	13.25 - 13.4
8.362 - 8.366	322 - 335.4	3260 - 3267	14.47 - 14.5
13.36 - 13.41	399.9 - 410	3332 - 3339	15.35 - 16.2
25.5 - 25.67	608 - 614	3345.8 - 3358	17.7 - 21.4
37.5 - 38.25	960 - 1240	3600 - 4400	22.01 - 23.12
73 - 75.4	1300 - 1427	4500 - 5250	23.6 - 24.0
108 - 121.94	1435 - 1626.5	5350 - 5460	31.2 - 31.8
123 - 138	1660 - 1710	7250 - 7750	36.43 - 36.5
149.9 - 150.05	1718.8 - 1722.2	8025 - 8500	Above 38.6
156.7 - 156.9	2200 - 2300	9000 - 9200	

(b) Except as provided in paragraph (d), the field strength of emissions appearing within these frequency bands shall not exceed the limits shown in Section 15.209. At frequencies equal to or less than 1000 MHz, compliance with the limits in Section 15.209 shall be demonstrated using measurement instrumentation employing a CISPR quasi-peak detector. Above 1000 MHz, compliance with the emission limits in Section 15.209 shall be demonstrated based on the average value of the measured emissions. The provisions in Section 15.35 apply to these measurements.

(c) Except as provided in paragraph (d), regardless of the field strength limits specified elsewhere in this Subpart, the provisions of this Section apply to emissions from any intentional radiator.

(d) The following devices are exempt from the requirements of this Section:

(1) Swept frequency field disturbance sensors operating between 1.705 and 37 MHz provided their emissions only sweep through the bands listed in paragraph (a), the sweep is never stopped with the fundamental emission within the bands listed in paragraph (a), and the fundamental emission is outside of the bands listed in paragraph (a) more than 99% of the time the device is actively transmitting, without compensation for duty cycle.

(2) Transmitters used to detect buried electronic markers at 101.4 kHz which are employed by telephone companies.

(3) Cable locating equipment operated pursuant to Section 15.213.

Section 15.207 Conducted limits.

(a) For an intentional radiator which is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) The limit in paragraph (a) shall not apply to intentional radiators operated as carrier current systems in the frequency range of 450 kHz to 30 MHz. Such systems are subject to radiated emission limits as provided in Sections 15.205 and 15.209.

(c) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.209 Radiated emission limits, general requirements.

(a) Except as provided elsewhere in this Subpart, the emissions from an intentional radiator shall not exceed the field strength levels specified in the following table:

Frequency (MHz)	Field Strength (microvolts/meter)	Measurement Distance (meters)
0.009 - 0.490	2400/F(kHz)	300
0.490 - 1.705	24000/F(kHz)	30
1.705 - 30.0	30	30
30 - 88	100 **	3
88 - 216	150 **	3
216 - 960	200 **	3
Above 960	500	3

** Except as provided in paragraph (g), fundamental emissions from intentional radiators operating under this Section shall not be located in the frequency bands 54-72 MHz, 76-88 MHz, 174-216 MHz or 470-806 MHz.

(b) In the emission table above, the tighter limit applies at the band edges.

(c) The level of any unwanted emissions from an intentional radiator operating under these general provisions shall not exceed the level of the fundamental emission. For intentional radiators which operate under the provisions of other Sections within this Part and which are required to reduce their unwanted emissions to the limits specified in this table, the limits in this table are based on the frequency of the unwanted emission and not the fundamental frequency. However, the level of any unwanted emissions shall not exceed the level of the fundamental frequency.

(d) The emission limits shown in the above table are based on measurements employing a CISPR quasi-peak detector except for the frequency bands 9-90 kHz, 110-490 kHz and above 1000 MHz. Radiated emission limits in these three bands are based on measurements employing an average detector.

(e) The provisions in Sections 15.31, 15.33, and 15.35 for measuring emissions at distances other than the distances specified in the above table, determining the frequency range over which radiated emissions are to be measured, and limiting peak emissions apply to all devices operated under this Part.

(f) In accordance with Section 15.33(a), in some cases the emissions from an intentional radiator must be measured to beyond the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator because of the incorporation of a digital device. If measurements above the tenth harmonic are so required, the radiated emissions above the tenth harmonic shall comply with the general radiated emission limits applicable to the incorporated digital device, as shown in Section 15.109 and as based on the frequency of the emission being measured, or, except for emissions contained in the restricted frequency bands shown in Section 15.205, the limit on spurious emissions specified for the intentional radiator, whichever is the higher limit. Emissions which must be measured above the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator and which fall within the restricted bands shall comply with the general radiated emission limits in Section 15.109 that are applicable to the incorporated digital device.

(g) Perimeter protection systems operating under the provisions of this Section in the frequency bands allocated to TV broadcast stations, as shown in Part 73 of this Chapter, shall contain their fundamental emissions within the frequency bands 54-72 MHz and 76-88 MHz. Further, the use of such perimeter protection systems is limited to industrial, business and commercial applications.

Radiated Emission Limits, Additional Provisions

Section 15.215 Additional provisions to the general radiated emission limitations.

(a) The regulations in Sections 15.217-15.251 provide alternatives to the general radiated emission limits for intentional radiators operating in specified frequency bands. Unless otherwise stated, there are no restrictions as to the types of operation permitted under these sections.

(b) In most cases, unwanted emissions outside of the frequency bands shown in these alternative provisions must be attenuated to the emission limits shown in Section 15.209. In no case shall the level of the unwanted emissions from an intentional radiator operating under these additional provisions exceed the field strength of the fundamental emission.

(c) For those bands of frequencies where alternative radiated emission limitations apply and for which a frequency stability is not specified, it is recommended that the fundamental frequency be kept within at least the central 80% of the permitted band in order to minimize the possibility of out-of-band operation.

(d) Where the following sections specify limits on the bandwidth of the emissions, the bandwidth limits include the effects of frequency sweeping, frequency hopping, and other modulation techniques which may be employed.

Section 15.217 Operation in the band 160 - 190 kHz.

(a) The total input power to the final radio frequency stage (exclusive of filament or heater power) shall not exceed one watt.

(b) The total length of the transmission line, antenna, and ground lead (if used) shall not exceed 15 meters.

(c) All emissions below 160 kHz or above 190 kHz shall be attenuated at least 20 dB below the level of the unmodulated carrier. Determination of compliance with the 20 dB attenuation specification may be based on measurements at the intentional radiator's antenna output terminal unless the intentional radiator uses a permanently attached antenna, in which case compliance shall be demonstrated by measuring the radiated emissions.

Section 15.219 Operation in the band 510 - 1705 kHz.

(a) The total input power to the final radio frequency stage (exclusive of filament or heater power) shall not exceed 100 milliwatts.

(b) The total length of the transmission line, antenna and ground lead (if used) shall not exceed 3 meters.

(c) All emissions below 510 kHz or above 1705 kHz shall be attenuated at least 20 dB below the level of the unmodulated carrier. Determination of compliance with the 20 dB attenuation specification may be based on measurements at the intentional radiator's antenna output terminal unless the intentional radiator uses a permanently attached antenna, in which case compliance shall be demonstrated by measuring the radiated emissions.

Section 15.221 Operation in the band 525 - 1705 kHz.

(a) The provisions of this Section are restricted to the operation of an AM broadcast station on a college or university campus or on the campus of any other educational institution. Operation is restricted to the grounds of the campus. For the band 535-1705 kHz, the frequency of

operation shall be chosen such that operation is not within the protected field strength contours of licensed AM stations.

(b) On the campus, the field strength of emissions appearing outside of this frequency band shall not exceed the general radiated emission limits shown in Section 15.209 as measured from the radiating source. There is no limit on the field strength of emissions appearing within this frequency band, except that the provisions of Section 15.5 continue to apply.

(c) At the perimeter of the campus, the field strength of any emissions, including those within the frequency band 525 - 1705 kHz, shall not exceed the general radiated emission limits in Section 15.209.

(d) The conducted limits specified in Section 15.207 apply to the radio frequency voltage on the public utility power lines outside of the campus. Due to the large number of radio frequency devices which may be used on the campus, contributing to the conducted emissions, as an alternative to measuring conducted emissions on the AC power lines outside of the campus, it is acceptable to demonstrate compliance with this provision by measuring each individual intentional radiator employed in the system at the point where it connects to the AC power lines. As provided in Section 15.207(b), if only a carrier current system is employed, the AC power line conducted limits do not apply. However, the radiated emission limits provided in this Section apply to carrier current systems.

(e) A grant of equipment authorization is not required for a campus radio system. In lieu thereof, a campus radio system shall be verified for compliance with the regulations in accordance with Subpart J of Part 2 of this Chapter. This data shall be kept on file at the location of the studio, office or control room associated with the transmitting equipment. In some cases, this may correspond to the location of the transmitting equipment.

Section 15.223 Operation in the band 1.705 - 10 MHz.

(a) The field strength of any emission within the band 1.705-10.0 MHz shall not exceed 100 microvolts/meter at a distance of 30 meters. However, if the bandwidth of the emission is less than 10% of the center frequency, the field strength shall not exceed 15 microvolts/meter or (the bandwidth of the device in kHz) divided by (the center frequency of the device in MHz) microvolts/meter at a distance of 30 meters, whichever is the higher level. For the purposes of this Section, bandwidth is determined at the points 6 dB down from the modulated carrier. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35(b) for limiting peak emissions apply.

(b) The field strength of emissions outside of the band 1.705-10.0 MHz shall not exceed the general radiated emission limits in Section 15.209.

Section 15.225 Operation within the band 13.553 - 13.567 MHz.

(a) The field strength of any emissions within this band shall not exceed 10,000 microvolts/meter at 30 meters.

(b) The field strength of any emissions appearing outside of this band shall not exceed the general radiated emission limits shown in Section 15.209.

(c) The frequency tolerance of the carrier signal shall be maintained within +0.01% of the operating frequency over a temperature variation of -20 degrees to +50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

Section 15.227 Operation within the band 26.96 - 27.28 MHz.

(a) The field strength of any emission within this band shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(b) The field strength of any emissions which appear outside of this band shall not exceed the general radiated emission limits in Section 15.209.

Section 15.229 Operation within the band 40.66 - 40.70 MHz.

(a) Unless operating pursuant to the provisions in Section 15.231, the field strength of any emissions within this band shall not exceed 1000 microvolts/meter at 3 meters.

(b) The field strength of any emissions appearing outside of this band shall not exceed the general radiated emission limits in Section 15.209.

(c) The frequency tolerance of the carrier signal shall be maintained within +0.01% of the operating frequency over a temperature variation of -20 degrees to + 50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

Section 15.231 Periodic operation in the band 40.66 - 40.70 MHz and above 70 MHz.

(a) The provisions of this Section are restricted to periodic operation within the band 40.66 - 40.70 MHz and above 70 MHz. Except as shown in paragraph (e) of this Section, the intentional radiator is restricted to the transmission of a control signal such as those used with alarm systems, door openers, remote switches, etc. Radio control of toys is not permitted. Continuous transmissions, such as voice or video, and data transmissions are not permitted. The prohibition against data transmissions does not preclude the use of recognition codes. Those codes are used to identify the sensor that is activated or to identify the particular component as being part of the system. The following conditions shall be met to comply with the provisions for this periodic operation:

(1) A manually operated transmitter shall employ a switch that will automatically deactivate the transmitter within not more than 5 seconds of being released.

(2) A transmitter activated automatically shall cease transmission within 5 seconds after activation.

(3) Periodic transmissions at regular predetermined intervals are not permitted. However, polling or supervision transmissions to determine system integrity of transmitters used in security or safety ap-

plications are allowed if the periodic rate of transmission does not exceed one transmission of not more than one second duration per hour for each transmitter.

(4) Intentional radiators which are employed for radio control purposes during emergencies involving fire, security, and safety of life, when activated to signal an alarm, may operate during the pendency of the alarm condition.

(b) In addition to the provisions of Section 15.205, the field strength of emissions from intentional radiators operated under this Section shall not exceed the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emissions (microvolts/meter)
40.66 - 40.70	2,250	225
70 - 130	1,250	125
130 - 174	1,250 to 3,750 **	125 to 375 **
174 - 260	3,750	375
260 - 470	3,750 to 12,500 **	375 to 1,250 **
Above 470	12,500	1,250

** linear interpolations

(1) The above field strength limits are specified at a distance of 3 meters. The tighter limits apply at the band edges.

(2) Intentional radiators operating under the provisions of this Section shall demonstrate compliance with the limits on the field strength of emissions, as shown in the above table, based on the average value of the measured emissions. As an alternative, compliance with the limits in the above table may be based on the use of measurement instrumentation with a CISPR quasi-peak detector. The specific method of measurement employed shall be specified in the application for equipment authorization. If average emission measurements are employed, the provisions in Section 15.35 for averaging pulsed emissions and for limiting peak emissions apply. Further, compliance with the provisions of Section 15.205 shall be demonstrated using measurement instrumentation with a CISPR quasi-peak detector.

(3) The limits on the field strength of the spurious emissions in the above table are based on the fundamental frequency of the intentional radiator. Spurious emissions shall be attenuated to the average limits shown in this table or to the general limits shown in Section 15.209, as measured with a CISPR quasi-peak detector, whichever limit permits a higher field strength.

(c) The bandwidth of the emission shall be no wider than 0.25% of the center frequency for devices operating above 70 MHz and below 900 MHz. For devices operating above 900 MHz, the emission shall be no wider than 0.5% of the center frequency. Bandwidth is determined at the points 20 dB down from the modulated carrier.

(d) For devices operating within the frequency band 40.66-40.70 MHz, the bandwidth of the emission shall be confined within the band edges and the frequency tolerance of the carrier shall be + 0.01%. This frequency tolerance shall be maintained for a temperature variation of -20 degrees to +50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

(e) Intentional radiators may operate at a periodic rate exceeding that specified in paragraph (a) and may be employed for any type of operation, including operation prohibited in paragraph (a), provided the intentional radiator complies with the provisions of paragraphs (b) through (d) of this Section, except the field strength table in paragraph (b) is replaced by the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emission (microvolts/meter)
40.66 - 40.70	1,000	100
70 - 130	500	50
130 - 174	500 to 1,500 **	50 to 150 **
174 - 260	1,500	150
260 - 470	1,500 to 5,000 **	150 to 500 **
Above 470	5,000	500

** linear interpolations

In addition, devices operated under the provisions of this paragraph shall be provided with a means for automatically limiting operation so that the duration of each transmission shall not be greater than one second and the silent period between transmissions shall be at least 30 times the duration of the transmission but in no case less than 10 seconds.

Section 15.233 Operation within the bands 46.60 - 46.98 MHz and 49.66 - 50.0 MHz.

(a) The provisions shown in this Section are restricted to cordless telephones.

(b) An intentional radiator used as part of a cordless telephone system shall operate on one or more of the following frequency pairs:

Channel	Base Transmitter (MHz)	Handset Transmitter (MHz)
1	46.610	49.670
2	46.630	49.845
3	46.670	49.860
4	46.710	49.770
5	46.730	49.875
6	46.770	49.830
7	46.830	49.890
8	46.870	49.930
9	46.930	49.990
10	46.970	49.970

(c) The field strength of the fundamental emission shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(d) The fundamental emission shall be confined within a 20 kHz band centered on the actual carrier frequency. Modulation products outside of this 20 kHz band shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. Emissions on any frequency more than 20 kHz removed from the center frequency shall consist solely of unwanted emissions and shall not exceed the general radiated emission limits in Section 15.209.

(e) All emissions exceeding 20 microvolts/meter at 3 meters are to be reported in the application for certification. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in Section 2.989 of this Chapter.

(f) If the device provides for the connection of external accessories, including external electrical input signals, the device must be tested with the accessories attached. The emission tests shall be performed with the device and accessories configured in a manner which tends to produce the maximum level of emissions within the range of variations that can be expected under normal operating conditions.

(g) The frequency tolerance of the carrier signal shall be maintained within +0.01% of the operating frequency. The tolerance shall be maintained for a temperature variation of -20 degrees C to +50 degrees C at normal supply voltage, and for variation in the primary voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

(h) For equipment authorization, a single application form, FCC Form 731, may be filed for a cordless telephone system, provided the application clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements. When a single application form is submitted, both the base station and the portable handset must carry the same FCC identifier. The application shall include a fee for certification of each type of transmitter and notification or certification, if appropriate, for each type of receiver included in the system.

(i) A cordless telephone which is intended to be connected to the public telephone network shall also comply with the applicable regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

(j) The label required under Subpart A shall also contain the following statement: "Privacy of communications may not be ensured when using this phone".

(k) The box or other package in which the individual cordless telephone is to be marketed shall carry a statement in a prominent location, visible to the buyer before purchase, which reads as follows:

> NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possibly calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party).

An application for certification of a cordless telephone shall specify the complete text of the statement that will be carried on the package and indicate where, specifically, it will be located on the carton.

Section 15.235 Operation within the band 49.82 - 49.90 MHz.

(a) The field strength of any emission within this band shall not exceed 10,000 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(b) The field strength of any emissions appearing between the band edges and up to 10 kHz above and below the band edges shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. The field strength of any emissions removed by more than 10 kHz from the band edges shall not exceed the general radiated emission limits in Section 15.209. All signals exceeding 20 microvolts/meter at 3 meters shall be reported in the application for certification.

(c) For a home-built intentional radiator, as defined in Section 15.23(a), operating within the band 49.82-49.90 MHz, the following standards may be employed:

> (1) The RF carrier and modulation products shall be maintained within the band 49.82-49.90 MHz.
>
> (2) The total input power to the device measured at the battery or the power line terminals shall not exceed 100 milliwatts under any condition of modulation.
>
> (3) The antenna shall be a single element, one meter or less in length, permanently mounted on the enclosure containing the device.
>
> (4) Emissions outside of this band shall be attenuated at least 20 dB below the level of the unmodulated carrier.
>
> (5) The regulations contained in Section 15.23 of this Part apply to intentional radiators constructed under the provisions of this paragraph.

(d) Cordless telephones are not permitted to operate under the provisions of this Section.

Section 15.237 Operation in the bands 72.0 - 73.0 MHz and 75.4 - 76.0 MHz.

(a) The intentional radiator shall be restricted to use as an auditory assistance device.

(b) Emissions from the intentional radiator shall be confined within a band 200 kHz wide centered on the operating frequency. The 200 kHz band shall lie wholly within the above specified frequency ranges.

(c) The field strength of any emissions within the permitted 200 kHz band shall not exceed 80 millivolts/meter at 3 meters. The field strength of any emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed 1500 microvolts/meter at 3 meters. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.239 Operation in the band 88 - 108 MHz.

(a) Emissions from the intentional radiator shall be confined within a band 200 kHz wide centered on the operating frequency. The 200 kHz band shall lie wholly within the frequency range of 88-108 MHz.

(b) The field strength of any emissions within the permitted 200 kHz band shall not exceed 250 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The field strength of any emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed the general radiated emission limits in Section 15.209.

(d) A custom built telemetry intentional radiator operating in the frequency band of 88-208 MHz and used for experimentation by an educational institute need not be certified provided the device complies with the standards in this Part and the educational institution notifies the Engineer in Charge of the local FCC office, in writing, in advance of operation, providing the following information:

(1) The dates and places where the device will be operated;

(2) The purpose for which the device will be used;

(3) A description of the device, including the operating frequency, RF power output, and antenna; and,

(4) A statement that the device complies with the technical provisions of this Part.

Section 15.241 Operation in the band 174 - 216 MHz.

(a) Operation under the provisions of this Section is restricted to biomedical telemetry devices.

(b) Emissions from the device shall be confined within a 200 kHz band which shall lie wholly within the frequency range of 174-216 MHz.

(c) The field strength of any emissions radiated within the specified 200 kHz band shall not exceed 1500 microvolts/meter at 3 meters. The field strength of emissions radiated on any frequency outside of the specified 200 kHz band shall not exceed 150 microvolts/meter at 3 meters. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.243 Operation in the band 890 - 940 MHz.

(a) Operation under the provisions of this Section is restricted to devices that use radio frequency energy to measure the characteristics of a material. Devices operated pursuant to the provisions of this Section shall not be used for voice communications or the transmission of any other type of message.

(b) The field strength of any emissions radiated within the specified frequency band shall not exceed 500 microvolts/meter at 30 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The field strength of emissions radiated on any frequency outside of the specified band shall not exceed the general radiated emission limits in Section 15.209.

(d) The device shall be self-contained with no external or readily accessible controls which may be adjusted to permit operation in a manner inconsistent with the provisions in this Section. Any antenna that may be used with the device shall be permanently attached thereto and shall not be readily modifiable by the user.

Section 15.245 Operation within the bands 902 - 928 MHz, 2435 - 2465 MHz, 5785 - 5815 MHz, 10500 - 10550 MHz, and 24075 - 24175 MHz.

(a) Operation under the provisions of this Section is limited to intentional radiators used as field disturbance sensors, excluding perimeter protection systems.

(b) The field strength of emissions from intentional radiators operated within these frequency bands shall comply with the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (millivolts/meter)	Field Strength of Harmonics (millivolts/meter)
902 - 928	500	1.6
2435 - 2465	500	1.6
5785 - 5815	500	1.6
10500 - 10550	2500	25.0
24075 - 24175	2500	25.0

(1) Field strength limits are specified at a distance of 3 meters.

(2) Emissions radiated outside of the specified frequency bands, except for harmonics, shall be attenuated by at least 50 dB below the level of the fundamental or to the general radiated emission limits in Section 15.209, whichever is the lesser attenuation.

(3) The emission limits shown in the above table are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

Section 15.247 Operation within the bands 902 - 928 MHz, 2400 - 2483.5 MHz, and 5725 - 5850 MHz.

(a) Operation under the provisions of this Section is limited to frequency hopping and direct sequence spread spectrum intentional radiators that comply with the following provisions:

(1) For frequency hopping systems, at least 75 hopping frequencies, separated by at least 25 kHz, shall be used. The average time of occupancy on any frequency shall not be greater than 0.4 seconds within a 30 second period. The maximum bandwidth of the hopping channel is 25 kHz.

(2) For direct sequence systems, the minimum 6 dB bandwidth shall be at least 500 kHz.

(b) The maximum peak output power of the intentional radiator shall not exceed one watt.

Note: Spread spectrum systems are sharing these bands on a noninterference basis with systems supporting critical Government requirements that have been allocated the usage of these bands, secondary only to ISM equipment operated under the provisions of Part 18 of this Chapter. Many of these Government systems are airborne radiolocation systems that emit a high EIRP which can cause interference to other users. Also, investigations of the effect of spread spectrum interference to U. S. Government operations in the 902-928 MHz band may require a future decrease in the power limits allowed for spread spectrum operation.

Section 15.249 Operation within the bands 902 - 928 MHz, 2400 - 2483.5 MHz, 5725 - 5875 MHz, and 24.0 - 24.25 GHz.

(a) The field strength of emissions from intentional radiators operated within these frequency bands shall comply with the following:

Fundamental Frequency	Field Strength of Fundamental (millivolts/meter)	Field Strength of Harmonics (microvolts/meter)
902 - 928 MHz	50	500
2400 - 2483.5 MHz	50	500
5725 - 5875 MHz	50	500
24.0 - 24.25 GHz	250	2500

(b) Field strength limits are specified at a distance of 3 meters.

(c) Emissions radiated outside of the specified frequency bands, except for harmonics, shall be attenuated by at least 50 dB below the level of the fundamental or to the general radiated emission limits in Section 15.209, whichever is the lesser attenuation.

(d) As shown in Section 15.35(b), for frequencies above 1000 MHz, the above field strength limits are based on average limits. However, the peak field strength of any emission shall not exceed the maximum permitted average limits specified above by more than 20 dB under any condition of modulation.

Section 15.251 Operation within the bands 2.9 - 3.26 GHz, 3.267 - 3.332 GHz, 3.339 - 3.3458 GHz, and 3.358 - 3.6 GHz.

(a) Operation under the provisions of this Section is limited to automatic vehicle identification systems (AVIS) which use swept frequency techniques for the purpose of automatically identifying transportation vehicles.

(b) The field strength anywhere within the frequency range swept by the signal shall not exceed 3000 microvolts/meter/MHz at 3 meters in any direction. Further, an AVIS, when in its operating position, shall not produce a field strength greater than 400 microvolts/meter/MHz at 3 meters in any direction within + 10 degrees of the horizontal plane. In addition to the provisions of Section 15.205, the field strength of radiated emissions outside the frequency range swept by the signal shall be limited to a maximum of 100 microvolts/meter/MHz at 3 meters, measured from 30 MHz to 20 GHz for the complete system. The emission limits in this paragraph are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

(c) The minimum sweep repetition rate of the signal shall not be lower than 4000 sweeps per second, and the maximum sweep repetition rate of the signal shall not exceed 50,000 sweeps per second.

(d) An AVIS shall employ a horn antenna or other comparable directional antenna for signal emission.

(e) Provision shall be made so that signal emission from the AVIS shall occur only when the vehicle to be identified is within the radiated field of the system.

(f) In addition to the labelling requirements in Section 15.19(a), the label attached to the AVIS transmitter shall contain a third statement regarding operational conditions, as follows:

... and, (3) during use this device (the antenna) may not be pointed within + ** degrees of the horizontal plane.

The double asterisks in condition three (**) shall be replaced by the responsible party with the angular pointing restriction necessary to meet the horizontal emission limit specified in paragraph (b).

(g) In addition to the information required in Subpart J of Part 2, the application for certification shall contain:

(1) Measurements of field strength per MHz along with the intermediate frequency of the spectrum analyzer or equivalent measuring receiver;

(2) The angular separation between the direction at which maximum field strength occurs and the direction at which the field strength is reduced to 400 microvolts/meter/MHz at 3 meters;

(3) A photograph of the spectrum analyzer display showing the entire swept frequency signal and a calibrated scale for the vertical and horizontal axes; the spectrum analyzer settings that were used shall be labelled on the photograph; and,

(4) The results of the frequency search for spurious and sideband emissions from 30 MHz to 20 GHz, exclusive of the swept frequency band, with the measuring instrument as close as possible to the unit under test.

FOOTNOTES

[1] Measurement of electromagnetic emissions from periodic emitters and intentional radiators operating on frequencies below 30 MHz requires special procedures to address technical problems that do not arise in measurement of such emissions from other intentional radiators operating on higher frequencies. Therefore, the measurement procedure herein does not address devices operating on frequencies below 30 MHz or periodic emitters. We plan to initiate separate rule making proceedings to establish measurement procedures for other types of devices as part of our plans for implementing the new Part 15 rules.

[2] *See Report and Order* in GEN Docket No. 87-389, adopted March 30, 1989, FCC 89-103, 4 FCC Rcd 3493 (1989)

[3] *See First Report and Order* in GEN Docket No. 87-389, *supra,* at paragraph 16. Non-lincensed RF devices are permitted to operate subject to the condition that they comply with Part 15 technical standards and cause no interference to authorized radio services. Such devices receive no protection from interference caused by other RF equipment.

[4] The Commission will continue to employ its existing measurement procedures pending the adoption of the new TP-3.

[5] *OCE Bulletin 19*, "FCC Test Procedure for Wireless Microphones and Auditory Assistance Devices."

[6] *OCE Bulletin 40*, "FCC Measurement Procedure for a Microwave Field Disturbance Sensor."

[7] We will continue to employ the existing measurement procedures for intentional radiators pending our adoption of the new TP-3 procedure.

[8] *See Report and Order* in GEN Docket 87-389, paragraphs 91-95, FCC 89-103, 4 FCC Rcd 3493 (1989).

[9] In GEN Docket 87-389, the Commission provided that intentional radiators verified by the party responsible for the device or for which an application for a grant of equipment authorization is submitted to the Commission are to comply with the provisions of the new Part 15 rules within 3 years of the effective date of the *Report and Order* and that such equipment that is manufactured or imported on or after 5 years from that date must comply with the new rules. *See Report and Order* GEN Docket 87-389, *supra,* at para. 149; and 47 CFR Section 15.37(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-118

In the Matter of

FCC Procedure for Measurement of
Unintentional Radiators (Except
Digital Devices and Devices
Operating below 30 MHz)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 12, 1989; Released: June 29, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to establish a new procedure for measuring electromagnetic emissions from most unintentional radiators operating under Part 15 of the Commission's rules. This new procedure, "FCC Procedure for Measurement of Unintentional Radiators (Except Digital Devices and Devices Operating below 30 MHz) FCC/OET TP-4" (TP-4) is intended to set forth uniform testing methods for testing such devices for compliance with the technical standards adopted in the Commission's recent comprehensive revision of Part 15.[1]

BACKGROUND

2. In the *First Report and Order* in GEN. Docket No. 87-389 (Docket No. 87-389) the Commission, *inter alia*, adopted new classifications for non-licensed RF devices permitted to operate under Part 15.[2] One of the new classifications, unintentional radiators, includes devices that intentionally generate RF energy for use within the device or that send signals by conduction to associated equipment via connecting wires but which are not intended to *emit* RF energy by radiation or induction. Examples of unintentional radiators include radio and TV receivers, TV interface devices, and cable terminal devices. These devices were classified as restricted radiation devices under the former Part 15 rules.

3. In Docket No. 87-389, the Commission revised a number of the technical standards that apply to unintentional radiators, including the limits on permissible electromagnetic emissions (EME) from such devices. The Commission also specified certain requirements for measuring EME from such devices for the purpose of determining compliance with the rules. For example, the rules were amended to specify the use of instrumentation with peak, average and quasi-peak detector functions, extend the range of frequencies to be measured for EME to include frequencies above 1000 MHz, standardize the range of the scan height of the measuring receiver antenna at 1 to 4 meters and establish the measurement distance for most unintentional radiators at a uniform 3 meters.

4. The Commission currently employs several measurement procedures for evaluating Part 15 unintentional radiator devices for compliance with the rules. Emissions from TV interface devices and transfer switch characteristics are measured using OET Bulletin MP-3.[3] The procedure for measurement of the UHF noise figure from TV receivers is set forth in OET Bulletin MP-2.[4] Cable input selector switch isolation is measured using the procedures in OET Bulletin MP-9.[5] Other types of unintentional radiators are tested using unpublished, but generally accepted methods for measuring line-conducted and radiated EME from RF devices.

DISCUSSION

5. The new Part 15 rules include revised operational standards and new measurement standards for most unintentional radiators which necessitate revision of the procedures for such devices. The measurement procedure TP-4 is designed to address these needs for revisions to the Part 15 test procedures for unintentional radiators. The new procedure, which is presented in Appendix A, would provide measurement instructions for the majority of unintentional radiators.[6] The proposed TP-4 would have the full force and effect of FCC regulations. In order to make the test procedures more readily available and clarify that they have the force of rules we intend to include the test procedures in the Commission's rules.

6. The proposed TP-4 specifies the test environment, test instrumentation, configuration of the equipment under test and instructions for setting up and performing measurements to be used in evaluating unintentional radiators for compliance with the Part 15 technical standards. Instructions are provided for measuring: 1) line conducted EME; 2) antenna conducted power measurements (for receivers only); 3) radiated EME; 4) output signal level measurements level signal; 5) antenna transfer switch measurements; and 6) noise figure and peak sensitivity measurements for TV receivers. The proposed TP-4 also provides instructions for recording/reporting test results.

7. The provisions of the proposed measurement procedure differ from those of the existing procedures for measuring restricted radiation devices in a number of respects. Some of these changes reflect the new measurement standards that were adopted in Docket No. 87-389. For example, the proposed TP-4 provides for using a CISPR quasi-peak detector to measure the line-conducted EME and the radiated EME below 1000 MHz of most types of equipment newly authorized under Docket No. 87-389. Under the existing procedures, these measurements are performed using an average detector. The proposed TP-4 provides for the use of both the average and peak detector functions for measuring EME from types of devices authorized under the former Part 15 rules. In addition, the proposed test for line-conducted EME specifies measurements over the range .45 to 30 MHz, whereas the existing procedures require such measurements over the more limited range .45 to 25 MHz. The proposed new procedure also, for the first time, would require radiated measurements above 1000 MHz. These radiated EME measurements would be performed using both the average and peak detector functions. Finally the new procedure

would standardize the distance of the antenna from the equipment under test in radiated EME measurements at 3 meters. This differs from the existing procedures, which specify distances from 3 to 30 meters depending on the device being tested.

8. The proposed TP-4 also includes a number of refinements intended to improve the quality and consistency of the measurement results. For example under the proposed procedure, a 50 uH/ 50 ohm line impedance stabilization network (LISN) would be used in the line-conducted EME tests instead of the 5 uH/50 ohm LISN currently used. Also, radiated EME tests uniformly would be conducted with the receiving antenna varied in height from 1 to 4 meters rather than the current practice of a variety of antenna heights depending on the present specified test distance.

9. The proposed TP-4 continues the existing practice of measuring TV receivers on all VHF channels and measuring the UHF oscillator frequencies of such receivers as required under Section 15.31(n). This measurement requirement was not addressed in Docket No. 87-389, however, in reviewing this rule we believe that it may not be necessary to measure TV receivers this extensively. For example, it may be more desirable to measure TV receivers a fixed number of VHF and UHF channels. For example, measurements would be made on three VHF channels 2, 6, and 13 and three representative UHF channels 14, 39, and 69. We are considering changing Section 15.31(n) of the rules to reduce the current testing burden and request comment on this procedure.

10. Comments are requested on the degree to which the proposed measurement procedure would provide an effective means of evaluating unintentional radiators for compliance with the rules. Comments are also sought on the burden, in terms of both direct costs and time to complete tests, this procedure would impose on those who evaluate Part 15 unintentional radiators. We invite suggestions for minimizing this burden in a manner that would not compromise the quality and consistency of the test measurements. Comments are sought on whether all input ports on a TV interface device or a cable system terminal device should be considered cable or antenna inputs and therefore, be required to be measured for isolation to determine if they comply with the cable input selector switch standards. In addition, comments are requested on whether the format of the test procedure is clear and whether the level of guidance furnished in the procedure is sufficient to permit the procedures to readily performed. Interested parties are requested to suggest changes which would improve the accuracy and repeatability of the test results when measurements are performed at different facilities.

11. In conclusion, we welcome comments on all aspects of the proposed test procedures, and any other issues that may bear on the effectiveness of these procedures for safeguarding the radio frequency environment with the minimum burden on equipment suppliers. However, we do not intend to consider comments that deal with issues that were previously decided or are being addressed in related proceedings. In particular, we will not consider comments proposing changes in the technical standards for unintentional radiators.

PROCEDURAL MATTERS

12. Under the procedures set out in Section 1.415 of the Commission's rules, interested persons may file comments on or before **August 21, 1989**,and reply comments on or before **September 5, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided such information or writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

13. In accordance with the provisions of Section 1.419 of the Commission's rules, formal participants shall file an original and five (5) copies of their comments and other materials. Participants wishing each Commissioner to have a copy of their comments should file an original and 11 copies. Members of the public who wish to express their comments are given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters in Washington, D.C.

14. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that the matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

15. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

16. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and Purpose of this action: The purpose of this proposed procedure is to set forth uniform methods for testing unintentional radiators for compliance with the recent comprehensive revision of Part 15 of the Commission's rules adopted in the *First Report and Order* in GEN. Docket No. 87-389. Since the existing measurement procedures used to evaluate these devices are not satisfactory for evaluating devices under the revised rules, it is necessary to develop a new measurement procedure.

II. The objectives: Our objective in proposing this new measurement procedure for unintentional radiators is to provide the basis for a consistent and repeatable test program for evaluating these devices for compliance with the newly revised rules.

III. Legal Basis: The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304, and 307 of the Communications Act of 1934, as amended.

IV. Description of potential impact and number of small entities affected: It is believed that the test procedure will benefit manufactures and test laboratories by speeding testing and reducing compliance costs. The proposed test procedure would modify the present procedures for measuring unintentional radiators. Its adoption potentially would affect all manufacturers of unintentional radiators and laboratories performing equipment authorization tests on such devices. However, the exact number of small entities affected is not known.

V. Recording, record keeping and other compliance requirements: The the proposed measurement procedures would increase the reporting/record keeping requirements of parties responsible for Part 15 unintentional radiators to the extent that the range of frequencies that must be measured has been increased slightly. However the format and content of the reporting/recording requirements has not been significantly modified.

VI. Federal rules which overlap or conflict with this rule: None.

VII. Any significant alternates minimizing impact on small entities and consistent with the stated objectives: None.

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the office of Management and Budget as prescribed by the Act.

18. For further information on this proceeding, contact Richard Fabina, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD. 21046, telephone (301) 725-1585. For further information concerning Part 15 of the Commissions rules contact, FCC, Technical Standards Branch, Room 7122, 2025 M St. N.W., Washington D.C. 20554, telephone (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A - NPRM IN FCC GENERAL DOCKET 89-118

THIS DOCUMENT IS INTENDED TO SOLICIT COMMENTS AND THE PROCEDURES CONTAINED HEREIN MAY NOT BE USED FOR COMPLIANCE TESTING UNTIL ADOPTED BY THE COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION

FCC PROCEDURE FOR MEASUREMENT OF UNINTENTIONAL RADIATORS (EXCEPT DIGITAL DEVICES AND DEVICES WHICH OPERATE BELOW 30 MHz)

Federal Communications Commission
Authorization and Evaluation Division
7435 Oakland Mills Road
Columbia, MD 21046

FCC/OET TP-4 (1989) May 1989

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SECTION I - GENERAL

This section applies to the testing of all unintentional radiators subject to this procedure.

1 INTRODUCTION

The procedure described herein sets forth uniform methods for testing unintentional radiators for compliance with Part 15 of the FCC Rules and Regulations, 47 CFR Part 15. Such equipment is to be measured for compliance with the limits for conducted electromagnetic emissions (EME), radiated EME above 30 MHz and other technical requirements which are set forth in the applicable portions of Part 15. This document specifies the environment, test instrumentation and equipment, requirements for the configuration of the equipment under test (EUT), test set-up, and measurement steps to be used in testing of unintentional radiators for compliance with the FCC rules.

1.1 Applicability

These procedures are to be used to determine compliance of most types of unintentional radiators with the EME limits and other technical requirements specified in Part 15 of the FCC rules. These procedures are not to be used for digital devices, CB receivers and carrier current systems. Such devices require specialized measurement procedures that are not addressed herein. These procedures also do not provide for measurements of the UHF noise figure of TV broadcast receivers and the isolation of stand-alone cable TV switches. Refer to publication FCC/OET TP-5 for the measurement procedure for testing digital devices *(See* reference [1]). Refer to publication FCC/OET TP-2 for the measurement procedure for testing CB receivers and carrier current systems *(See* reference [2]). Refer to publication FCC/OET MP-2 the procedure for measuring the UHF noise figure of TV broadcast receivers *(See* reference [3]). Refer to publication FCC/OET MP-9 the procedure for measuring the isolation of stand-alone cable TV switches *(See* reference [4]).

Other procedures may be used provided that the party responsible for the equipment demonstrates that the methods used yield results that are expected to be the same as the results that would be obtained using these procedures. In the event of a dispute, the results of tests performed in accordance with the procedures described herein will prevail.

1.2 Definitions

The definitions in Parts 2 and 15 of the FCC rules and the following definitions apply for purposes of these test procedures. The definitions in the *IEEE Standard Dictionary of Electrical and Electronics Terms,* 2nd Edition, IEEE-100-1984, also apply. Where there are differences between the IEEE definitions and the FCC definitions, as set forth in the rules and herein, the FCC definitions shall apply.

1.2.1 *Cable input selector switch* - A transfer switch that is intended as a means to alternate between the reception of broadcast signals via connection to an antenna and the reception of cable television service.

1.2.2 *Cable system terminal device (CSTD)* - A TV interface device that serves, as its primary function, to connect a cable system operated under Part 76 of this Chapter to a TV broadcast receiver or other subscriber premise equipment. Any device which functions as a CSTD in one of its operating modes must comply with the technical requirements for such devices when operating in that mode.

1.2.3 *CB receiver* - Any receiver that operates in the Personal Radio Services on frequencies allocated for Citizens Band (CB) Radio Service stations, as well as any receiver provided with a separate band specifically designed to receive the transmissions of CB stations in the Personal Radio Services. This includes the following: (1) a CB receiver sold as a separate unit of equipment; (2) the receiver section of a CB transceiver; (3) a converter to be used with any receiver for the purpose of receiving CB transmissions; and, (4) a multiband receiver that includes a band labelled "CB" or "11- meter" in which such band can be separately selected, except that an Amateur Radio Service receiver that was manufactured prior to January 1, 1960, and which includes an 11-meter band shall not be considered to be a CB receiver.

1.2.4 *Equipment under test (EUT)* - A representative sample of a device or system under test in a standard test configuration. This includes the unintentional radiator, system components, support equipment and connecting cables.

1.2.5 *Scanning receiver* - For the purpose of this rule Part, this is a receiver that automatically switches among four or more frequencies in the range of 30 to 960 MHz and which is capable of stopping at and receiving a radio signal detected on a frequency. Receivers designed solely for the reception of the broadcast signals under Part 73 of the regulations or for operation as part of a licensed station are not included in this definition.

1.2.6 *Simulator* - A device used in lieu of an actual product accessory which emulates the impedances, RF signals, electrical characteristics and interaction with the EUT of that product accessory.

1.2.7 *Support equipment* - An attachment or accessory to which the equipment under test is physically connected for auxiliary control or product enhancement.

1.2.8 *Television (TV) broadcast receiver* - A device designed to receive television pictures that are broadcast simultaneously with sound on the television channels authorized under Part 73 of this Chapter.

1.2.9 *Transfer switch* - A device used to alternate between the reception of over-the-air radio frequency signals via connection to an antenna and the reception of radio frequency signals received by any other method, such as from a TV interface device.

1.2.10 *TV interface device* - An unintentional radiator that produces or translates in frequency a radio frequency carrier modulated by a video signal derived from an external or internal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals or other non-baseband input connections of a television broadcast receiver. A TV interface device may include a stand-alone RF modulator, or a composite device consisting of an RF modulator, video source and other components devices. Examples of TV interface devices are video cassette recorders and terminal devices attached to a cable system or used with a Master Antenna (including those used for central distribution video devices in apartment or office buildings).

1.2.11 *Unintentional radiator* - A device that intentionally generates radio frequency energy for use within the device, or sends radio frequency signals by conduction to associated equipment via connecting wiring, but which is not intended to emit RF energy by radiation or induction.

1.3 Requests for Interpretations

Parties seeking interpretations or having questions about Part 15 regulations are invited to write to:

Chief, Technical Standards Branch
Federal Communications Commission
2025 M Street, N.W.
Room 7122
Washington, D.C. 20554

Questions concerning the procedures set forth herein should be addressed to:

Chief, Authorization and
Evaluation Division
F.C.C. Laboratory
7435 Oakland Mills Road
Columbia, Maryland 21046.

2 TEST ENVIRONMENT

2.1 Test Sites

Conducted EME measurements may be made at any suitable facility, including a shielded room, provided the facility otherwise meets the requirements for a proper test environment as specified below. Radiated EME measurements of the EUT should be made on an open area test site, or its equivalent, meeting the minimum requirements described in FCC/OET Bulletin 55 *(See* reference [5]). An alternative site may be used for radiated EME measurements provided that the results are satisfactorily correlated to those that would be obtained on an open area test site. A shielded room is not acceptable for making radiated EME measurements unless it is properly lined with EME absorbing material to eliminate reflections of emissions.

2.2 Ambient EME

It is desirable that the level of both the conducted and radiated ambient EME at the test site be at least 6 dB below the FCC limits applicable to the EUT. It is, of course, not always possible to meet this condition. If the ambient field strength and/or power-line level at some

frequencies within the specified measurement ranges are too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements at the closest distance possible permitted by near field considerations and convert the results to the equivalent level at the specified limit distance.

2) Perform measurements in critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

3) Perform measurements in a room lined with EME absorbing material.

Note: Measurements made in a non-absorber lined shielded (metal) enclosure are not acceptable for the purpose of determining compliance with radiated EME limits.

4) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

5) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EUT.

2.3 Temperature

The ambient temperature of the testing area should be within the range of 4 to 35 degrees Celsius (40 to 95 degrees Fahrenheit) unless the particular equipment requirements specify testing over a different temperature range.

2.4 Ground Plane

A ground plane or screen is required when line conducted EME tests are performed at laboratory facilities, but is not mandatory where the tests are performed at an on-site installation of the EUT. This ground plane is to consist of a conducting floor and at least one vertical earth-grounded conducting surface, e.g. the metal floor and a metal wall of a shielded test chamber. Each of these conducting surfaces is to be at least 2.0 x 2.0 meters in size. The part of the ground plane on the floor of the facility is to be covered by insulating material at least 3 millimeters thick, e.g. rubber matting or floor tile.

The use of a metal ground plane is strongly recommended for measurement of radiated EME. A ground plane is required if the test site is elevated above ground level (such as on a rooftop or raised platform) or located on pavement (such as asphalt or concrete). See OET Bulletin 55 in reference [5] for information regarding the size and material for a ground plane. Open area test sites are likely to need a ground plane when any of the following conditions exist at the site:

1) The terrain is discontinuous.

2) The terrain is subject to extreme seasonal variations in ground conductivity.

3) There are unburied power or control cables on the site.

4) The soil is sandy or rocky.

A ground plane should only be used for on-site testing when it will be a permanent part of the installation.

3 TEST INSTRUMENTATION AND EQUIPMENT

3.1 Measuring Instrument

EME measurements are to be made with a radio noise meter conforming to the specifications in references [6] and [7]. Measurements up to a frequency of 1000 MHz are to be made with an instrument meeting the CISPR quasi-peak specifications. Measurements above 1000 MHz are to be made with an instrument (or instruments) having a linear average detector and a peak detector function. Refer to Section 15.35 of the FCC Rules in Appendix 2 for more details concerning these measurement requirements.

Other instrumentation such as a spectrum analyzer, may be used for making these measurements. It is preferred that other measurement instruments used also conform to the specifications in references [6] and [7]. However, measurements taken with a measuring instrument that meets the above specifications will take precedence.

When a spectrum analyzer is used as the measuring instrument, appropriate accessories should be employed to provide sufficient sensitivity and overload protection to insure accurate and repeatable measurements of all emissions over the specified frequency range. The accessories needed will depend upon the specific measurement task and may include preamplifiers for improving sensitivity, filters and attenuators for overload protection, and additional quasi-peak detection circuitry. In this case, overload is harmonic distortion, intermodulation, or gain compression of spectrum analyzer input signals. If a post-detector filter is used, its bandwidth must be wide enough so as not to affect peak detector readings. Prior to taking final measurements, it may be necessary to take precautions to ensure that the spectrum analyzer operates linearly. The user's manual of the spectrum analyzer should be reviewed for instructions and guidance in this area. Application notes on the use of spectrum analyzers and other measurement instruments also are available from several manufacturers of this type of equipment.

Automatic scan techniques may be used, but the maximum scan speed is to be limited by the response time of the measuring system and, where applicable, by the repetition rate of the emissions being measured to ensure that the maximum levels of all emissions are measured. Where such techniques are employed, extreme caution must be exercised to ensure that each emission is maximized.

3.2 Antennas

Measurements of radiated EME are to be made using the following antennas:

Frequency Range	Antenna Type
30 to 1000 MHz	Tuned half-wave dipole
Above 1000 MHz	Linearly polarized horn

Other types of linearly polarized antennas may be used provided that the measurement results can be correlated to measurements made with the listed antennas. However, dipole and horn antennas are the reference antennas.

It is recommended that the measurement antenna be mounted on a stand that will facilitate raising and lowering of the antenna from 1 to 4 meters in height in an even, continuous manner and allow convenient reorienting of the antenna from the horizontal to the vertical plane.

3.3 Line Impedance Stabilization Network (LISN)

Measurements of the RF noise voltage on each conductor of the AC power cord of the EUT are to be made with the EUT connected to the public utility power lines through a line impedance stabilization network (LISN). Receivers operating under the transition provisions of Section 15.37 of the FCC Rules in Appendix 2 are to be tested while connected to the public utility power lines through a LISN having the impedance characteristics shown in Figure 1 (5 uH/50 ohms). All other unintentional radiators are to be tested while connected to the public utility power lines through a LISN having the impedance characteristics shown in Figure 2 (50 uH/50 ohms). Any network that provides the impedance characteristics shown in Figures 1 or 2 may be used. In addition, support equipment is to be connected to the power service through one or more additional LISNs of the same type used to power the EUT.

A separate LISN is required for each current carrying conductor in the EUT. AC power to the LISN is to be filtered to eliminate ambient RF voltages. An RF filter of the type used on the AC power lines feeding into a screen or shielded room should be installed on the AC utility power source for this set-up. The length of power line between each LISN and the RF filter is to be 3.0 meters and this line must be shielded. Electrically bond the LISN enclosure(s) and the RF filter to the ground plane. Each LISN unit is to have a coaxial-type connector that provides a 50 ohm terminating impedance for connection of the measuring instrumentation. A LISN is not to be used during radiated EME measurements since this usage would be outside its designed frequency range.

Commercial LISNs are either single section units with screw terminals or multi-section units that may have either screw terminals or an integral AC outlet. Where it is necessary to add an external AC outlet to a LISN with screw terminals, the outlet must be connected with low-impedance leads that are the minimum length necessary to connect the EUT to the LISN, *e.g.* 3 inches. The short leads are necessary to maintain the rated impedance of the LISN.

3.4 Test Platforms

During testing, hand-held or table-top unintentional radiators are to be placed on a non-conducting rectangular table or platform with a top surface of 1.0 x 1.5 meters in size and 0.8 meters in height above the ground plane. For radiated EME measurements, the table used is to be capable of rotating 360 degrees and is to be equipped with AC outlets on the rotator surface. A remote control turntable is recommended for convenience and accuracy in testing.

Floor-standing unintentional radiators do not require a test table. They are placed either on the floor for line conducted EME testing or the rotator for radiated EME testing.

3.5 Calibration

The measuring instruments, cables, antennas, and test facility are to be checked and calibrated as necessary on a regular basis to ensure the accuracy of the test results. Antenna cables are to be checked for changes in losses resulting from handling, frequent connection and disconnection, and exposure to the elements.

Antennas used in testing for radiated EME are to be calibrated for their free-space antenna factor to show traceability to the standard dipole antenna of the National Institute of Standards and Technology (formerly the National Bureau of Standards). Since antenna factors indicated by manufacturers may not be accurate, each antenna used for radiated measurements should be calibrated.

The impedance and isolation of each line impedance stabilization network (LISN), sometimes termed an artificial mains network, used for measuring conducted EME should be checked at least once a year in accordance with the procedure described in the attached Appendix 1.

4 CONFIGURATION OF EQUIPMENT UNDER TEST

4.1 Configuration of Equipment Under Test

The EUT shall be configured in a manner representative of the equipment as typically used. An unintentional radiator marketed to be operated as a stand-alone device is to be tested by itself. Conversely, an unintentional radiator designed and marketed to be operated as part of a multi-unit system shall be tested with all the system components, accessories, connecting cables, etc. normally used with the device attached to it and operating, to the extent possible, in a manner that is representative of actual use.

4.2 EUT System Cables

An unintentional radiator with connecting ports is to be connected to each system component or support device by an interconnecting cable. Interconnecting cables are to be of the type and length recommended for use with the equipment as marketed or as otherwise specified by the manufacturer of the equipment. If multiple lengths of cable may be used interchangeably with the equipment, the cables used are to be of the length that maximizes emissions. If the lengths of the cables to be used with the equipment are not established, cables one meter in length are to be used for testing. See Section 15.31(g) of the FCC Rules in Appendix 2.

4.3 Conditioning of the EUT

An unintentional radiator intended to receive a modulated RF carrier is to be tested while receiving a signal that produces normal operation of the EUT. An EUT equipped with antenna input terminals is to be tested with a typical signal supplied by the appropriate cable directly to these terminals at the maximum rated input level for the device at the proper impedance. An EUT equipped only with a permanently attached antenna is to receive a modulated RF carrier signal by radiation.

4.4 Use of System Components and Simulators

In cases where the EUT is part of a system of interfacing units, the following guidelines are to be used in configuring the EUT for testing:

1) If the EUT is designed to be used with specific support equipment or system components, it is to be tested with that equipment.

2) To the extent possible, the unintentional radiator and the support equipment or system components that form the test system for the EUT are to be equipment marketed by the EUT manufacturer. The specific support equipment used with the EUT in the test also is to be of a type typically used with the EUT in normal operation.

3) The support equipment or system components for the EUT are not to be modified in order to enable the EUT to achieve compliance unless the modified device(s) will be marketed with the EUT.

4) Equipment intended to be marketed as a system is to be tested as a system.

5) Because of the added degree of measurement uncertainty that is present when a simulator is employed in the testing process, use of such devices is to be avoided to the extent possible. If the EUT is a large device, a simulator may be used in place of an actual interfacing unit when the logistic circumstances of the equipment installation or the measurement facility would make the use of an interfacing unit impractical. However, it is important that any simulator used properly represent the electrical characteristics, such as impedances and RF signals, of the device for which it is substituted. In addition, any electrical interaction between the EUT and the actual system component unit due to mechanical characteristics should be duplicated by the simulator.

SECTION II - RADIATED AND CONDUCTED MEASUREMENTS

The test procedures described in this section are to be used to measure the line conducted EME, antenna conducted power and radiated EME from unintentional radiators.

5 LINE CONDUCTED EME MEASUREMENTS

Unintentional radiators designed to be connected to the AC power lines of a public utility are subject to a limit on the amount of EME coupled back into the power lines. Unintentional radiators that are exclusively battery operated with no provisions for operation while connected to the AC power lines are exempt from line conducted emission limits and this measurement requirement. Line conducted EME measurements are required for all other unintentional radiators that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power line indirectly, obtaining their power through another device which is connected to the AC power lines.

5.1 TV and FM Broadcast Receivers

TV and FM broadcast receivers are to be measured for line conducted EME using a procedure consisting of IEEE Standard 213, which is indicated in reference [8], with certain modifications. For these measurements, the IEEE 213 procedure is modified by specifying the use of an instrument with a CISPR quasi-peak detector, the use of a LISN as specified in Section 3.3 of this test procedure and 30 MHz as the upper limit of the frequency range to be scanned. TV receivers are to be tested for line conducted EME while tuned to the channels specified in Section 15.31 (n) of the Rules *(See* Appendix 2). FM receivers are to be tested for line conducted EME while tuned to the number of frequencies specified in Section 15.31 (m) of the Rules in Appendix 2. The line conducted EME requirements for TV and FM receivers are contained in Section 15.107 of the FCC Rules in the attached Appendix 2.

5.2 Other Unintentional Radiators

All unintentional radiators other than TV and FM broadcast receivers, digital devices, CB receivers, and current carrier systems are to be measured for line conducted EME in accordance with the following procedure:

5.2.1 Set-up

Step 1)

Place a hand-held or table-top EUT in the center of the test table or platform specified in Section 3.4. Set the test table on an earth-grounded conducting surface as specified in Section 2.4 and position it 0.4 meters from one earth-grounded vertical conducting surface. The table is not be closer to any other earth-grounded surface than 0.8 meters *(See* Figure 3).

Place a floor-standing EUT on the insulating material which covers the ground plane. Position the EUT 0.8 meters from the LISN and any other earth grounded conducting surface.

Step 2)

If the EUT is an individual hand-held or table-top component, it is to be located in the center of the table. If the EUT is part of a multi-unit system, the EUT is to be located in the center along the back edge of the table or in the center of the components on the floor, oriented as it would be in typical usage (see Figure 4).

Arrange the EUT on the table or floor, as appropriate, in a position as typical of normal use as possible and prepare it for operation, *i.e.* connect any component support units with cabling as specified in Section 4.2. System components or support equipment for the EUT are to be located on top of or to the sides of the EUT as appropriate for a typical operating configuration.

Other arrangements are acceptable where the EUT is designed to be positioned for use in a manner other than that described above, *e.g.* where the unintentional radiator and one or more system components are normally operated while lying on their side(s) instead of their bottom. In such cases, the EUT is to be arranged on the test table or floor as it would be in typical usage.

Step 3)

Bundle interconnecting cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter lengths until the overall length of cable is approximately one meter long. Each such interconnecting cable is to be bundled individually.

Interconnecting cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are, or will be, marketed with the EUT. It is not necessary to bundle EUT system cables that are permanently coiled.

Step 4)

Line conducted EME measurements are to be made with the EUT connected to the public utility lines through a nominal, standardized impedance, which is to be provided through a LISN as described in Section 3.3. The EUT power cord is to be connected directly to the LISN for these measurements even if the EUT normally receives power through another device in the system. Connect the EUT power cord to the appropriate port on the LISN and connect the LISN to the filter on the AC utility power source. Terminate unused RF ports on the LISNs into 50 ohms.

If the EUT is not provided with a power cord, the unit is to be connected to the LISN by a power cord of the type specified by the manufacturer. This power cord is to be no longer than 2.0 meters. If a non-flexible power cord is provided with the EUT, it is to be cut to the length necessary to attach the EUT to the LISN.

Step 5)

If the EUT is tested on a table or test platform, drape the AC power cord of the EUT over the rear edge of the table and allow it to hang down vertically to the top of the LISN. Wrap excess power cord in a figure "8" pattern around 2 non-metallic pegs that are 9 centimeters high, approximately 2 centimeters in diameter, spaced 10 centimeters on center apart and attached to the top of the LISN *(See* Figure 4).

If the EUT is tested on the floor, route the AC power cord directly to the LISN and bundle the excess AC power cord in a serpentine fashion in the center, using 30 to 40 centimeter lengths.

If the EUT is provided with a permanently coiled power cord, bundling of the cord is not required.

Step 6)

System components or support devices used to complete the EUT system are to be powered through a second LISN. This equipment is to be powered through a second LISN even where the EUT is provided with AC outlets for supplying power to system components. AC power for all LISNs is to be obtained from the same filtered source. Connect any system components and support equipment associated with the EUT to a second LISN. Additional LISNs may be used, if necessary, to supply power to system components, provided that the number of additional LISNs used is kept to a minimum. Supply lines to the LISNs are to be of the lengths specified in Figure 3 and must be shielded. Terminate unused RF ports on the LISN(s) into 50 ohms.

Step 7)

If the EUT is part of a multi-unit system that is tested with the EUT on a table, drape AC power cords of the system components or support equipment onto the insulating material that covers the ground plane. Do not wrap these power cords in a figure 8 pattern atop any LISN or bundle them in a serpentine fashion. No power cords from system components or support equipment are to be draped over the top of a LISN.

If the EUT is part of a multi-unit system that is tested with the EUT on the floor, the power cords of system components or support equipment are to lie in any convenient manner on the insulating material which covers the ground plane.

Step 8)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to the ground plane.

Step 9)

Provide the EUT with a typical signal which produces normal operation. If the EUT has an optional built-in antenna, disconnect it during these tests. Connect the input signals specified in Section 4.3 to the EUT via an appropriate cable and an impedance matching network (usually 300 ohms balanced or 75 ohms unbalanced) to the proper input terminals on the EUT. The input signal cable is to enter the testing area at a point on its ceiling directly over the EUT. If the EUT is provided only with a built-in antenna and has no provision for connection of an external antenna, couple the input signal to the EUT by radiation.

Step 10)

Connect the measuring instrument to a section of the LISN supplying power to the EUT using a suitable length of coaxial cable. The input to the measuring instrument is to be transferred in the testing to LISN sections connected to other current carrying conductors of the EUT to measure the line conducted emissions on those conductors. Any unused ports must be terminated into 50 ohms.

Step 11)

Record the arrangement of the equipment on the test table or floor. This is to include a diagram indicating the positions of the individual units of equipment and their interconnecting cables, distances between adjacent units and distances to the edge of the table or wall. Photographs clearly showing the position of the equipment may be used in lieu of, or in addition to, a diagram.

5.2.2 Testing for Conducted Emissions

Step 1)

Turn on the EUT, select or tune to any convenient frequency or channel in the EUT operating range and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Activate the equipment supplying the EUT with an input signal. Set the 6 dB bandwidth of the measuring instrument to not less than 9 kHz for conducted EME tests and the detector function to the CISPR quasi-peak mode.

Note: It may be desirable to make preliminary measurements with a spectrum analyzer to speed up the testing since more than one emission at a time can be observed with an analyzer.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure the conducted EME of the EUT. Measurements are to be made by tuning the measuring instrument in a continuous manner over the range 0.45 to 30 MHz.

Each emission is to be maximized by tuning the EUT or changing the operating channel, varying the mode of operation, varying the position of the interconnect cables, and changing the output channel of the EUT, as applicable. The following modes of operation are to be examined for every EUT:

a) The EUT powered on in standby mode.

b) The EUT operating in a typical fashion.

c) The EUT sending/receiving a typical signal, if applicable.

If the EUT is a multi-unit system, maximize each emission individually by rearranging the interconnecting cables. It is not necessary to rearrange the configuration of the EUT system to maximize emissions. Record the most significant emission levels on each conductor of the EUT in the range 0.45 to 30 MHz. If any of these emission levels exceed the FCC line conducted emission limits given in Section 15.107 of the Rules in Appendix 2, the device must be modified or redesigned before the equipment can comply with the FCC technical requirements.

Step 5)

Transfer the input to the measuring instrument to the section of the LISN connected to the next current carrying conductor of the EUT to be measured. Repeat Step 4 for each current carrying conductor of the EUT while the EUT remains tuned to the same operating frequency or channel.

Step 6)

Repeat Steps 4 and 5 with the EUT tuned to each frequency at which it is to be measured in accordance with Section 15.31(m) of the FCC Rules in Appendix 2.

Step 7)

Record the data in accordance with the data reporting/recording requirements specified in Section 10.

6 ANTENNA CONDUCTED POWER MEASUREMENTS (RECEIVERS ONLY)

Antenna conducted power measurements are to be performed if a receiver is tested for compliance with the FCC radiated EME limits with a terminating resistor rather than an antenna connected to the antenna input terminals. Compliance with the antenna conducted power limit is to be determined by measuring the voltage present at the antenna input terminals of a receiver in accordance with the procedure below.

Antenna conducted power measurements are not required for receivers which are tested for radiated EME with an antenna attached to the receiver antenna input terminals. See Section 15.111 of the Rules (This section of the rules is shown in Appendix 2) for a further explanation of the antenna conducted power limits and their application. Also, these measurements are not required if the unintentional radiator is provided with only a permanently attached antenna.

6.1 Set-up

Step 1)

The EUT is to be tested for antenna conducted power while set up in the same configuration used for line conducted measurements in Section 5.2.1.

Step 2)

Disconnect the coaxial cable connecting the measurement instrument to the LISN. Terminate all RF ports on the LISNs into 50 ohms.

Step 3)

Disconnect the receive antenna from the EUT. Connect the measurement instrument to the antenna input terminals of the EUT. Use a direct connection only if the impedances are matched. Otherwise, use a balun or impedance matching network to connect the measuring instrument to the antenna input terminals.

If the EUT is tunable over a continuous range of frequencies rather than decreet channels, a spectrum analyzer should be used to determine the highest voltage present at the antenna terminals. A measuring instrument which has the required CISPR quasi-peak or average detector functions may be substituted, as appropriate, for the spectrum analyzer to determine compliance.

6.2 Testing for Antenna Conducted Power

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Determine the frequency range of measurements for unintentional radiators from Section 15.33 of the Rules *(See* Appendix 2).

Note: If antenna conducted power measurements are required below 30 MHz on a particular unintentional radiator in accordance with Section 15.33 of the Rules, see publication FCC/OET TP-2 for the recommended test procedure.

Step 3)
Set the 6 dB bandwidth of the measuring instrument to 120 kHz and the detector function of the unit to the CISPR quasi-peak mode.

Step 4)
Calibrate the measuring instrument.

Step 5)
Tune the EUT to a receive channel as specified in Section 15.31(m) or (n) of the FCC Rules *(See* Appendix 2). While the EUT remains tuned to this channel, measure the voltage present at the receive antenna terminals of the EUT. Measurements generally are to be made by tuning the measuring instrument in a continuous manner over the frequency range 30 to 1000 MHz.

Step 6)
Record the most significant voltages present at the antenna terminals, their frequencies and the receive channel of the EUT associated with each measurement. If any of these voltage levels exceed the CISPR quasi-peak level shown in the note below, the device must be modified or redesigned before the equipment can comply with the FCC antenna conducted power limits for receivers specified in Section 15.111 of the FCC Rules *(See* Appendix 2).

Note: Measured with a CISPR quasi-peak detector between 30 and 1000 MHz and an average detector above 1000 MHz, a voltage of 316 microvolts into 50 ohms is compliant with the antenna conducted power specifications. Measured with a peak detector above 1000 MHz, a voltage of 3.16 millivolts into 50 ohms is compliant with the antenna conducted power specifications since the peak limit is 20 dB above the average limit.

Step 7)
If antenna conducted power measurements are not required above 1000 MHz, proceed to Step 10. If antenna conducted power measurements are required above 1000 MHz, set the 6 dB bandwidth of the measuring instrument to at least 1 MHz and the detector function of that unit to the peak mode. Calibrate the measuring instrument.

Step 8)
Measure the voltage present at the receive antenna terminals of the EUT above 1000 MHz up to the maximum measurement frequency for the EUT, as determined in Step 2 above, by tuning the measuring instrument in a continuous manner over this frequency range. Record the most significant voltages present at the antenna terminals, their frequencies and the receive channel of the EUT. If any of these voltage levels exceed 3.16 millivolts, the device must be modified or redesigned before the equipment can comply with the FCC antenna conducted power limits for receivers. If all of these voltage levels are less than 316 microvolts, proceed to Step 10. If any of these voltages are less than 3.16 millivolts but exceed 316 microvolts, proceed to Step 9.

Step 9)
Set the detector function of the measuring instrument to the average mode and calibrate it. Remeasure the voltages present at the receive antenna terminals of the EUT in Step 8 which exceeded 316 microvolts but were less than 3.16 millivolts. Record the most significant voltages observed. If any of these voltages exceed 316 microvolts, the device must be modified or redesigned before it can comply with the FCC antenna conducted power limits for receivers.

Step 10)
Tune the EUT to the next receive channel as specified in Section 15.31(m) or (n) of the FCC Rules and repeat the measurement scheme in Steps 3 through 9 until all voltages have been measured with the EUT operating on each receive channel specified in these sections of the Rules.

Step 11)
Record the data in accordance with the data reporting/recording requirements specified in Section 10.

7 RADIATED EME MEASUREMENTS

Receivers can be tested for compliance with the radiated EME requirements with a terminating resistor rather than an antenna connected to the antenna input terminals, provided the receiver is also tested for compliance with the antenna conducted power requirements specified in Section 15.111 of the FCC Rules *(See* Appendix 2). It is not necessary to test a receiver for the antenna conducted power requirements if an antenna is attached to the receiver antenna input terminals during radiated EME testing.

7.1 Preliminary Testing

It is often useful to perform preliminary radiated EME tests at a distance closer than that specified in the applicable standards to determine the EME characteristics of the EUT. At nearer distances, it is sometimes easier to determine the spectrum signature of the EUT and, in some instances, the positions of cables that produce the maximum level of emissions. A site other than an open field site or equivalent facility may be used for this purpose. However, the test engineer should be aware that alternate sites may not produce results that correlate with results obtained at the required site. During preliminary testing, the EUT should be set-up in the same arrangement and operated in the same manner that will be employed in the actual radiated tests. A spectrum analyzer and broadband antennas are often useful for this type of testing. If a radio noise meter is used in preliminary testing, it is recommended that either headphones or a loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of significant emissions from the EUT. Care must be taken not to miss any significant EME from the EUT during the preliminary tests.

7.2 TV and FM Broadcast Receivers

TV and FM broadcast receivers are to be tested for compliance with the FCC radiated EME requirements using a procedure consisting of any of the following industry standards, IEEE Standard 187 (1951) (see in reference [9]), IEC Publication 106 (1974) (see reference [10]) or EIA Standard RS-378 (1970) (see reference [11]), with certain modifications. For radiated EME measurements, those procedures are to be modified by specifying the use of an instrument with a CISPR quasi-peak detector between 30 and 1000 MHz, an instrument with a peak and average detector above 1000 MHz, and the upper limit of the frequency range to be scanned as specified in Section 15.33 of the Rules in Appendix 2 attached.

TV receivers are to be tested for radiated EME while tuned to the channels specified in Section 15.31(n) of the Rules *(See* Appendix 2). FM receivers are to be tested for radiated EME while tuned to the number of frequencies specified in Section 15.31(m) of the Rules in Appendix 2. The radiated EME requirements for TV and FM receivers are contained in Section 15.109 of the Rules *(See* Appendix 2).

7.3 Other Unintentional Radiators

All other unintentional radiators except digital devices, CB receivers, and current carrier systems are to be measured for radiated EME. All radiated EME from the EUT, including that from any system components and interconnecting cables, is to be measured in accordance with the following procedure:

7.3.1 Set-up

Step 1)

Place a hand-held or table-top EUT atop the non-conducting table or platform specified for radiated tests in Section 3.4. Locate the table on a test site meeting the conditions for radiated tests specified in Section 2.1. Place a floor standing EUT on a rotator or other non-conducting surface at least 25 centimeters, but no more than 45 centimeters, above the site ground plane.

Step 2)

Arrange the EUT on the table or rotator in a position as typical of normal use as possible and prepare it for operation, *i.e.* connect any component support units with cabling as specified in Section 4.2. Connect the output cable(s) supplied with the EUT to the output connector(s) on the EUT and terminate each cable with a matching resistor or dummy load. Also terminate any unused input connector(s) with a matching resistor or dummy load. If the EUT is an individual hand-held or table-top unit, it is to be located in the center of the table. If the EUT is a multi-component system, the components are to be positioned in accordance with the instructions in Step 2 of Section 5.2.1 as shown in Figure 4.

Step 3)

Bundle EUT system cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter loops until the overall cable length is one meter. Each such EUT system cable is to be bundled individually. EUT system cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are marketed with the EUT. EUT system cables that are permanently coiled are not required to be bundled.

Step 4)

Connect the EUT and its support equipment to the AC outlets on the rotator surface of the test table. The EUT power cord is to be connected directly to an AC outlet on the test table for these measurements even if the EUT normally receives power through another device in the system. Allow excess power cord lengths to hang down vertically over the rear edge of the table top to lie unbundled on the rotator surface.

Step 5)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to ground at the AC outlet on the rotator.

Step 6)

Determine the frequency range of measurements for unintentional radiators from Section 15.33 of the Rules *(See* Appendix 2).

Note: If radiated EME measurements are required below 30 MHz on a particular unintentional radiator in accordance with Section 15.33 of the Rules, see publication FCC/OET TP-2 for the recommended test procedure.

Step 7)

Set up the measuring instrument and the proper antenna as specified in Section 3.2 for measuring emissions in the range 30 to 1000 MHz, with connection of the antenna to the measuring instrument through an appropriate length of coaxial cable. Locate the antenna a distance of 3 meters from the EUT. This distance is measured as the horizontal distance from: 1) the nearest point on the measurement antenna when that antenna is oriented to receive emissions from that device; to 2) the nearest point on the EUT, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system over a complete rotation of the turntable.

Step 8)

Record the arrangement of the equipment on the test table or rotator. This is to include a diagram indicating the positions of the individual units of equipment and their interconnecting cables, distances between adjacent units and distances to the edge of the table or rotator. Photographs clearly showing the position of the equipment may be used in lieu of, or in addition to, a diagram.

7.3.2 Testing for Radiated Emissions

Step 1)
Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)
Prepare to measure emissions in the frequency range 30 - 1000 MHz by setting the 6 dB bandwidth of the measuring instrument to 120 kHz and the detector function of that unit to the CISPR quasi-peak mode.

Step 3)
Calibrate the measuring instrument.

Step 4)
Tune the EUT to a receive channel as specified in Section 15.31(m) of the FCC Rules found in Appendix 2. While the EUT remains tuned to this channel, measure radiated EME over the frequency range 30 - 1000 MHz. Search for emissions by tuning the measuring instrument in a continuous manner over this range.

Each emission is to be maximized by varying the mode of operation and the position of the interconnect cables, if applicable. The following modes of operation are to be examined for every EUT:

a) The EUT powered on in standby mode.

b) The EUT operating in a typical fashion.

c) The EUT receiving a typical signal, if applicable.

Continue to maximize each emission by rotating the test platform though 360 degrees and raising and lowering the measurement antenna from 1 to 4 meters, and again rearranging the interconnecting cables and rotating the test table 360 degrees. Repeat this process for the other polarity of the measurement antenna *i.e.* horizontal first, then vertical.

Record the most significant emission levels observed with the antenna in the horizontal and vertical positions in each of these frequency ranges: 30 - 88 MHz, 88 - 216 MHz, and 216 - 1000 MHz. If any of these emission levels exceed the FCC radiated EME limits in Section 15.109 of the Rules contained in Appendix 2, the device must be modified or redesigned before the equipment can comply with the FCC technical rules.

Step 5)
If radiated EME measurements above 1000 MHz are not required, proceed to Step 8. If radiated EME measurements above 1000 MHz are required, connect the proper antenna to the measuring instrument and set it at a distance of 3 meters from the EUT. Set the 6 dB bandwidth of the measuring receiver to at least 1 MHz and the detector function of that unit to the peak mode. Calibrate the measuring instrument.

Step 6)
With the EUT still tuned to the same frequency, measure emissions above 1000 MHz up to the maximum measurement frequency for the EUT, as determined in Section 15.33 of the Rules *(See* Appendix 2), using the measurement scheme described in Step 4 above. Record the most significant emission levels observed with the measurement antenna in the horizontal and vertical positions for the frequency ranges 1000 - 2000 MHz, 2000 - 5000 MHz, and 5000 MHz, up to the highest frequency examined. When measured using an average detector as specified in Section 15.35 of the Rules *(See* Appendix 2), if all of these emission levels comply with the radiated EME limits in Section 15.109 of the FCC Rules in Appendix 2, proceed to Step 8. If any of these emission levels exceed the peak limits, which are 20 dB above the average limits, the device must be modified or redesigned before it can comply with the FCC technical rules. If any of these emission levels exceed the average limits but comply with the peak limits, proceed to Step 7.

Step 7)
Set the detector function of the measuring instrument to the average mode and calibrate the measuring instrument. Remeasure those emissions from Step 6 above which exceeded the average limits but complied with the peak limits, again using the appropriate antenna and measurement scheme described in Step 4. Record the most significant emission levels observed with the antenna in the horizontal and vertical positions for each particular emission. If any of these emission levels exceed the average radiated EME limits, the device must be modified or redesigned before it can comply with the FCC technical rules.

Step 8)
Tune the EUT to the next receive channel as specified in Section 15.31(m) of the FCC Rules *(See* Appendix 2) and repeat the measurement scheme in Steps 4 through 7 until all radiated EME have been measured with the EUT operating on each receive channel specified in this section of the Rules.

Step 9)
Record the data in accordance with the data reporting/recording requirements specified in Section 10.

SECTION III - SPECIAL MEASUREMENTS

This Section contains special measurements for certain types of unintentional radiators that are subject to special requirements in the FCC Rules.

8 OUTPUT SIGNAL LEVEL MEASUREMENTS

Output signal level measurements are required for all cable system terminal devices (CSTDs) and TV interface devices. The output signal level is the maximum voltage level present at the output terminal(s) of a CSTD or TV interface device during normal use of the device. The maximum voltage corresponds to the peak envelope power of the video modulated signal during maximum amplitude peaks. Measurements shall be made of the levels of both the aural and visual carriers of each output channel on which the TV interface device operates.

8.1 Set-up

Step 1)

The output signal level is to be measured while the EUT is in the same configuration and test set-up used for radiated measurements. Once set up in this configuration, proceed as described below.

Step 2)

Disconnect the terminating resistor from the connector at the end of the output cable of the EUT. If the connector at the end of the output cable of the EUT is a non-coaxial design such as twin lead, skip to Step 4.

Step 3)

Using any convenient length of coaxial cable, connect the output cable of the EUT to the measuring instrument using an appropriate impedance matching device, if necessary. It may be necessary to place a high gain, low noise amplifier between the impedance matching device and the measuring instrument to increase the signal to noise ratio of the signal to be measured. Skip to Step 6.

Step 4)

Connect the section of twin lead provided with the EUT to a balun which in turn is connected to the measuring instrument. It may be necessary to place a high gain, low noise amplifier between the balun and the measuring instrument to increase the signal to noise ratio of the signal to be measured.

Step 5)

Support the output cable of the EUT in a straight horizontal line from the device to the measuring equipment. The cable is to have at least 0.75 meters clearance from any conducting surface.

Step 6)

Terminate all unused inputs and outputs on the EUT's antenna transfer switch with the proper impedance.

8.2 Testing for Output Signal Level

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition. Provide the EUT with a typical signal consistent with normal operation.

Step 2)

Set the bandwidth of the measuring instrument according to the frequency being measured as follows:

measurement freq.	bandwidth
below 30 Mhz	10 kHz
30 to 1000 MHz	100 kHz
above 1000 MHz	1 MHz

Step 3)

Calibrate the measuring instrument.

Step 4)

Determine the frequency range over which to measure output signal levels from Section 15.33 of the FCC Rules in Appendix 2.

Step 5)

Measure and record the level of all emissions in the specified frequency range, the frequency of the emission and output channel of the EUT for each channel on which the device operates and in each mode in which the device operates. If any of these levels exceeds the output signal level limits in Section 15.115(b) of the FCC Rules *(See* Appendix 2), the device must be modified or redesigned before it can comply with the FCC technical rules.

Note: Signals which do not exceed the following voltage levels in microvolts, when 50 ohms is the terminating resistance (R), are compliant with this requirement.

	Video	Audio	Spurious
CSTDs	4,899	1,096	4,899
TV inter. dev.	2,449	548	77

Step 6)

Record the measurements in accordance with the data reporting/recording requirements in Section 10.

9 ANTENNA TRANSFER SWITCH MEASUREMENTS

Cable system terminal devices (CSTDs), other types of TV interface devices, and TV receivers that employ built-in cable input selector switches and external (stand-alone) cable input selector switches must be measured for switch isolation. Measurements of switch isolation for devices that employ built-in cable input selector switches are described in Section 9.1. Measurements of isolation in stand-alone cable input selector switches are to be performed using the procedures described in publication FCC/OET MP-9 (1987) listed in reference [4].

TV interface devices that employ built-in antenna transfer switches and do not provide for connection to cable service must be measured for the maximum voltage that appears at the switch terminals. Procedures for these measurements are described in Section 9.2. The maximum voltage appearing at the antenna input terminals of such switches corresponds to the peak envelope power of the video modulated signal during maximum amplitude peaks.

9.1 Devices with Built-in Cable Input Selector Switches

The following describes the procedure to be used to measure the isolation of a cable input selector switch that is an integral part of an unintentional radiator equipped with cable television input(s).

9.1.1 Set-up

Step 1)

Transfer switch measurements are to measured with the EUT in the same configuration and test set-up used for output signal measurements.

Step 2)

Remove the terminating resistor from the antenna input terminals on the antenna transfer switch of the EUT. Connect the proper terminating resistor to the end of the output cable of the TV interface device.

Step 3)

Using the type and length of interconnecting cable provided with the TV interface device, recommended in the instruction manual, or normally employed by the consumer, connect the antenna input terminal on the transfer switch to the measuring instrument using an appropriate impedance matching device, if necessary. It may be necessary to place a high gain, low noise amplifier between the impedance matching device and the measuring instrument to increase the signal to noise ratio of the signal to be measured.

Step 4)

Connect the cable input terminal of the device to a typical broadband cable TV signal consistent with Section 15.115(d) of the Rules *(See* Appendix 2).

Step 5)

Terminate all unused inputs or outputs on the antenna transfer switch with the proper impedance.

9.1.2 Testing for Antenna Transfer Switch Isolation

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition. Turn on the broadband cable TV signal source.

Step 2)

Set the bandwidth of the measuring instrument to not less than 9 kHz for these measurements. A wider bandwidth may be used provided sufficient signal to noise ratio is available.

Step 3)

Calibrate the measuring instrument.

Step 4)

For all positions of the antenna transfer switch, measure and record the level and frequency of each emission appearing at the antenna input terminals over the frequency range 54 to 550 MHz. Also record the position of the antenna transfer switch during these measurements.

Step 5)

Turn the EUT off, and repeat the antenna transfer switch measurements in Step 4.

Step 6)

Connect the measurement instrument to any other antenna input terminal on the transfer switch. Terminate all unused inputs and outputs on the antenna transfer switch and repeat Steps 4 and 5 for each antenna input terminal on the transfer switch.

Note: Other input terminals not intended for connection of an antenna are not considered antenna input terminals.

Step 7)

If the EUT operates on more than one output channel, repeat Steps 4 through 6 for each output channel.

Step 8)

Disconnect the cable TV signal source from the EUT and connect it to the measuring instrument using proper impedance matching device and attenuation, if necessary.

Step 9)

Record the levels of the same emissions detected in Steps 4 through 7 above. Subtract the level(s) recorded in Steps 4 through 7 from the level measured in this Step, being careful to compare emissions on the same frequency. If any of these emissions at the antenna input terminals are not isolated by the amounts specified in Section 15.115(c) of the FCC Rules *(See* Appendix 2), either the device or the antenna transfer switch must be modified or redesigned before it can comply with the FCC technical rules.

Step 10)

Record the measurements in accordance with the data reporting/recording requirements in Section 10.

9.2 Other TV Interface Devices

The procedure used to measure the voltage present at the antenna input terminals on an antenna transfer switch of an unintentional radiator not equipped with cable television input(s) is:

9.2.1 Set-up

Step 1)

Transfer switch measurements are to measured with the EUT in the same configuration and test set-up used for output signal level measurements.

Step 2)

Remove the terminating resistor from the antenna input terminal on the transfer switch of the EUT. Connect the proper terminating resistor to the end of the output cable of the TV interface device.

Step 3)

If the antenna input terminal is to be connected to the antenna by a non-coaxial connection such as twin lead, proceed to Step 4.

Using the type and length of interconnecting cable provided with the TV interface device, recommended in the instruction manual, or normally employed by the consumer, connect the antenna input terminal of the transfer switch to the measuring instrument using the appropriate impedance matching device, if necessary. It may be necessary to place a high gain, low noise amplifier between the impedance matching device and the measuring instrument to increase the signal to noise ratio of the signal to be measured. Skip to Step 7.

Step 4)
Connect a section of twin lead 3/4 of a wavelength long at the EUT output signal frequency to the antenna input terminals of the transfer switch.

Step 5)
Connect the other end of the twin lead to a balun which in turn is connected to the measuring instrument. It may be necessary to place a high gain, low noise amplifier between the balun and the measuring instrument depending upon the levels to be measured.

Step 6)
Support the twin lead in a straight horizontal line from the TV interface device to the measuring equipment. The twin lead is to have at least 0.75 meters clearance from any conducting surface.

Step 7)
Terminate all unused inputs and outputs on the antenna transfer switch with the proper impedance.

9.2.2 Testing for Antenna Transfer Switch Voltage

Step 1)
Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition. Provide the EUT with a typical signal consistent with normal operation.

Step 2)
Set the bandwidth of the measuring instrument to not less than 9 kHz for these measurements. A wider bandwidth may be used provided sufficient signal to noise ratio is available.

Step 3)
Calibrate the measuring instrument.

Step 4)
For all positions of the antenna transfer switch, measure and record the level and frequency of each emission appearing at the antenna input terminals over the frequency range specified in Section 15.33 of the FCC Rules *(See* Appendix 2). Also record the position of the antenna transfer switch during these measurements.

Step 5)
If the EUT is equipped with multiple inputs suitable for use with an antenna, use the same cable and connect the measurement instrument to another of those antenna input terminals. Terminate all unused inputs and outputs on the antenna transfer switch and repeat Step 4 for each input terminal on the transfer switch that is suitable for use with an antenna.

Note: Other input terminals not intended for connection of an antenna are not considered antenna input terminals.

Step 6)
If the antenna input terminal is to be connected to the antenna by a non-coaxial connection such as twin lead, continue with Step 7. If the antenna input terminal is to be connected to the antenna via coaxial cable and the measured voltages do not exceed the level specified in Section 15.115(c) of the FCC Rules *(See* Appendix 2), select another output channel on the EUT and repeat Step 4 through 5 above.

Note: Voltages which do not exceed a level of 2.45 microvolts, when 50 ohms is the terminating resistance (R), are compliant with this requirement.

If all voltages measured in this manner do not exceed the specified FCC limits, skip to Step 9. If any of these the voltage levels exceeds the level specified above, either the device or the antenna transfer switch must be modified or redesigned before it can comply with the FCC technical rules.

Step 7)
Cut the twin lead length by 1/4 wavelength at the EUT output signal frequency and reconnect the twin lead to the measurement instrument.

Step 8)
Repeat Steps 4 through 7 until a total of 3 measurements on each output channel have been made (one each at 3/4, 1/2 and 1/4 wavelength). The maximum voltage at the non-coaxial antenna input terminal of a transfer switch is taken to be the median of the values obtained in these 3 measurements. If this voltage exceeds the level specified in Section 15.115(c) of the Rules, either the device or the antenna transfer switch must be modified or redesigned before it can comply with the FCC technical rules.

Note: All 3 measurements need not be performed if, after performing the first 2 measurements, none of the voltage levels exceeds the specification. If only 2 measurements are performed, the value used to determine compliance with the regulations is the highest measured voltage of these 2 levels.

If this voltage does not exceed the level specified in the Rules, select another output channel on the EUT and repeat this process from Step 4 of Section 9.2.1 for that output channel.

Step 9)
Record the measurements in accordance with the data reporting/recording requirements in Section 10.

10 DATA REPORTING/RECORDING REQUIREMENTS

10.1 The Test Report
The test report for an unintentional radiator is to contain the following information:

1) The name, address and location of the test site(s) used for the line conducted and EME radiated measurements and whether these sites were laboratory facilities or on-site locations.

2) Identification and description, including input impedance, of the instrumentation and equipment used to perform the tests. This is to include identification of the type of antenna(s) used for measuring radiated emissions.

3) Specific identification, including the FCC ID's and serial numbers, if applicable, of the EUT and, in the case of multi-component systems, all equipment used in the system with the EUT.

4) Descriptions of the length and construction of each EUT system cable. The report is to indicate whether cables are shielded or unshielded, have plastic or metallic hoods, have ferrite beading, etc.

5) Diagrams of the positions of the equipment on the test table or floor in both the conducted and radiated EME tests.

6) A description of any alternative methods used in the testing, in accordance with the specifications in Section 10.4.

7) The test results and associated comparative information presented in accordance with the specifications in Sections 10.2 and 10.3.

8) A description of any modifications made to the EUT or other system components during the testing.

9) The name of the party who performed the tests.

10) The date the tests were performed.

11) A statement signed by the individual responsible for the test that the EUT as tested complies or does not comply with the applicable FCC rules.

12) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Note: In the case of devices required to be certificated, refer also to Part 2 and Part 15 of the FCC rules for general information requirements pertaining to all applications for certification.

10.2 Recorded Measurements

The 6 highest emissions measured on each conductor of the EUT power cord in the line conducted EME tests are to be recorded in the test report along with the operating or receive channel to which the EUT was tuned.

If antenna conducted power measurements are performed, the 6 highest emissions measured are to be recorded in the test report along with the operating or receive channel in accordance with Section 15.31(m) or (n) of the FCC Rules *(See* Appendix 2), as applicable.

The highest radiated EME measured with the antenna(s) in the horizontal and vertical planes in each of the frequency ranges 30-88 MHz, 88-216 MHz, 216-1000 MHz, 1000-2000 MHz, 2000-5000 MHz and 5000-40000 MHz are to be recorded in the test report of receivers for each operating frequency measured in accordance with Section 15.31(m) or (n) of the FCC Rules in Appendix 2, as appropriate. The same radiated EME emissions are to be recorded in the test report of other unintentional radiators for each operating channel of the EUT.

The video and audio output signal levels measured for every output channel available on the TV interface or cable system terminal device are to be recorded in the test report. In addition, for every output channel available on the device, the 3 highest signal levels measured 4.6 MHz below the video carrier frequency and the 3 highest signal levels measured 7.4 MHz above the video carrier frequency are to be recorded in the test report.

The minimum antenna transfer switch isolation level below 216 MHz and the minimum antenna transfer switch isolation level above 216 MHz for cable system terminal and similar devices are to be recorded in the measurement report. For all other TV interface devices, the maximum voltage measured at the antenna input terminals on the transfer switch for every output channel available on the device is to be recorded in the test report.

The report is also to contain a diagram of both the line conducted and radiated EME test set-ups clearly showing the positions of the individual units of equipment and their interconnecting cables, distances between adjacent units and distances to the edge of the table or wall. Photographs clearly showing the position of the equipment may be used in lieu of, or in addition to, a diagram.

The measurement results and the FCC limits for unintentional radiators, as appropriate, are to be presented in tabular form for comparison purposes. If a graphic presentation of the data is available, i.e. a plot from a spectrum analyzer, it should be incorporated into the test report also.

10.3 Units of Measurement

Measurements of line conducted EME, antenna conducted power, output signal level, and antenna transfer switch isolation for TV interface devices (except cable system terminal devices) are to be reported in units of microvolts or dB referenced to one microvolt (dBuV). Measurements of transfer switch isolation for cable system terminal and similar devices is to be reported in units of dB below the input level. Measurements of radiated EME are to be reported in units of microvolts per meter (uV/m) or dB referenced to 1 microvolt per meter (dBuV/m) at the distance specified in the FCC rules.

The indicated readings on the measuring instrument are to be converted to microvolts, dBuV, uV/m or dBuV/m by use of appropriate conversion factors.

These factors may include antenna factor, amplifier gain, balun loss, impedance transformation loss, etc. and must be given if they are part of the final recorded values. All formulas of conversions and conversion factors are to be included and explained in the measurement report. Radiated measurements taken at alternative distances are to be converted to the limit distance using the relationship specified in Section 15.31(f) of the FCC Rules *(See* Appendix 2). Refer to this rule section for additional information on performing radiated EME measurements at alternative distances.

10.4 Description of Alternate Methods and/or Conditions Used

If an alternate test method is used, e.g. a device tested for compliance with the transition provisions of Section 15.37 of the FCC Rules *(See* Appendix 2), the test report must identify and describe that method, provide justification for its use, and, as appropriate, describe how the results obtained through its use correlate with the methods speci-

fied herein. Instrumentation, instrument attenuator and bandwidth settings, detector function, EUT arrangement, and all other pertinent details of the test are to be provided. Where automatic scan techniques are used, an explanation of how each emission from the EUT was maximized and the scan rate used to obtain each recorded emission is to be included in the test report.

REFERENCES

[1] FCC/OET TP-5, "FCC Methods of Measurement of Radio Noise from Digital Devices", (Proposed test procedure-just released).

[2] FCC/OET TP-2, "FCC Methods of Measurement of Radio Noise below 30 MHz", (Proposed test procedure-not released).

[3] FCC/OET Measurement Procedure, MP-2 (1986), " Measurement of UHF Noise Figures of TV Receivers." *

[4] FCC/OET Measurement Procedure, MP-9 (1987), "FCC Procedure for Measuring Cable Television Switch Isolation."*

[5] FCC/OET Bulletin 55, "Characteristics of Open Field Test Sites".*

[6] American National Standard Specifications for Electromagnetic Interference and Field Strength Instrumentation 10 kHz to 40 GHz, ANSI C63.2 (1987).

[7] International Special Committee on Radio Interference (CISPR) Publication 16 - CISPR specification for radio interference measuring apparatus and measurement methods, 1987, 2nd edition.

[8] IEEE Standard 213, "Procedure for Measuring Conducted Emission in the Range 300 kHz to 25 MHz from Television and FM Broadcast Receivers to Power Lines, 1987"

[9] IEEE Standard 187, "Standards on Radio Receivers: Open Field Method of Measurement of Spurious Radiation from Frequency Modulation and Television Broadcast Receivers, 1951"

[10] IEC Publication 106 (1974), "Recommended Methods of Measurement of Radiated and Conducted Interference from Receivers for Amplitude- Modulation, Frequency-Modulation and Television Broadcast Transmissions."

[11] EIA Standard RS-378 (1970), "Measurement of Spurious Radiation from FM and TV Broadcast Receivers in the Frequency Range of 100 to 1000 MHz-Using the EIA-Laurel Broad-band Antenna."

[12] IEEE Standard 190, "Standards on Television: Methods of Testing Monochrome Television Broadcast Receivers, 1960."

[13] Parts 2 and 15 of the FCC Rules and Regulations (47 CFR Part 2 and 15).

[14] FCC/OET Bulletin 62, "Understanding FCC Rules for Digital Devices".*

* Copies of these documents are available from the FCC Consumer Assistance and Small Business Division, 1919 M Street., N.W., Washington, D.C. 20554.

FIGURES

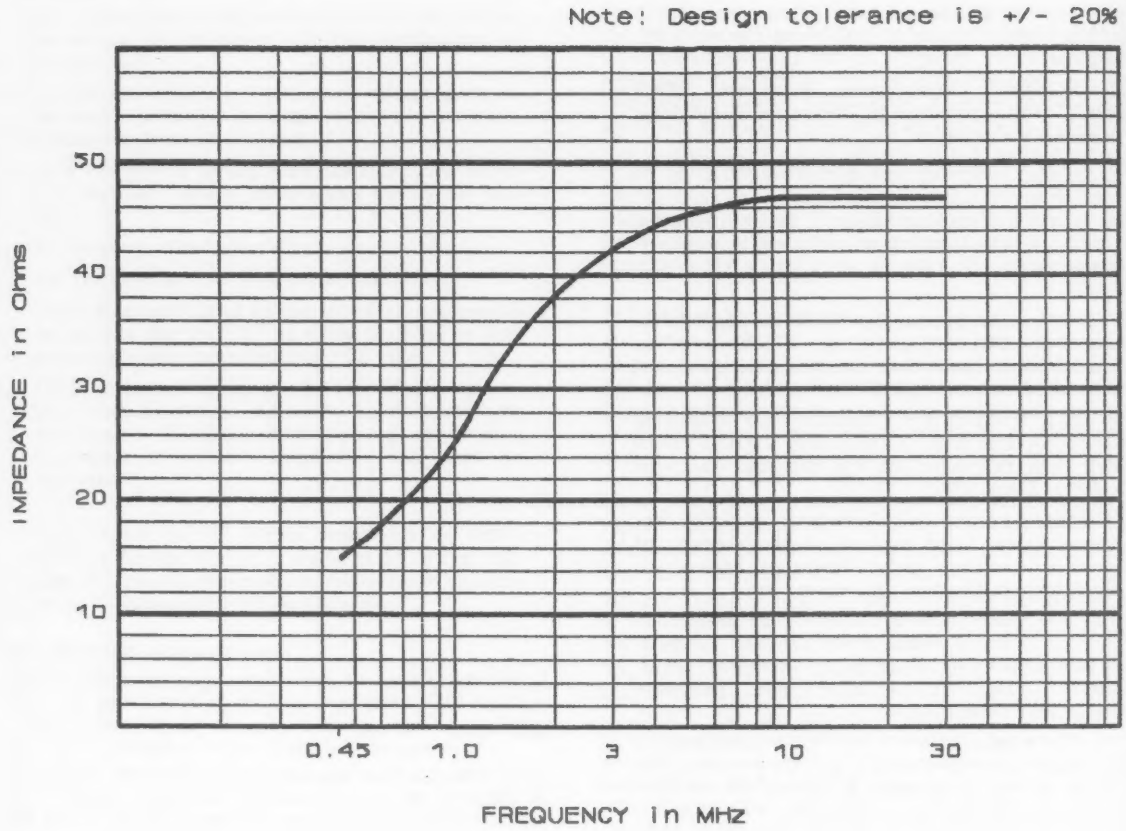

Figure 1 - Impedance Characteristics of 5 uH/ 50 ohm LISN

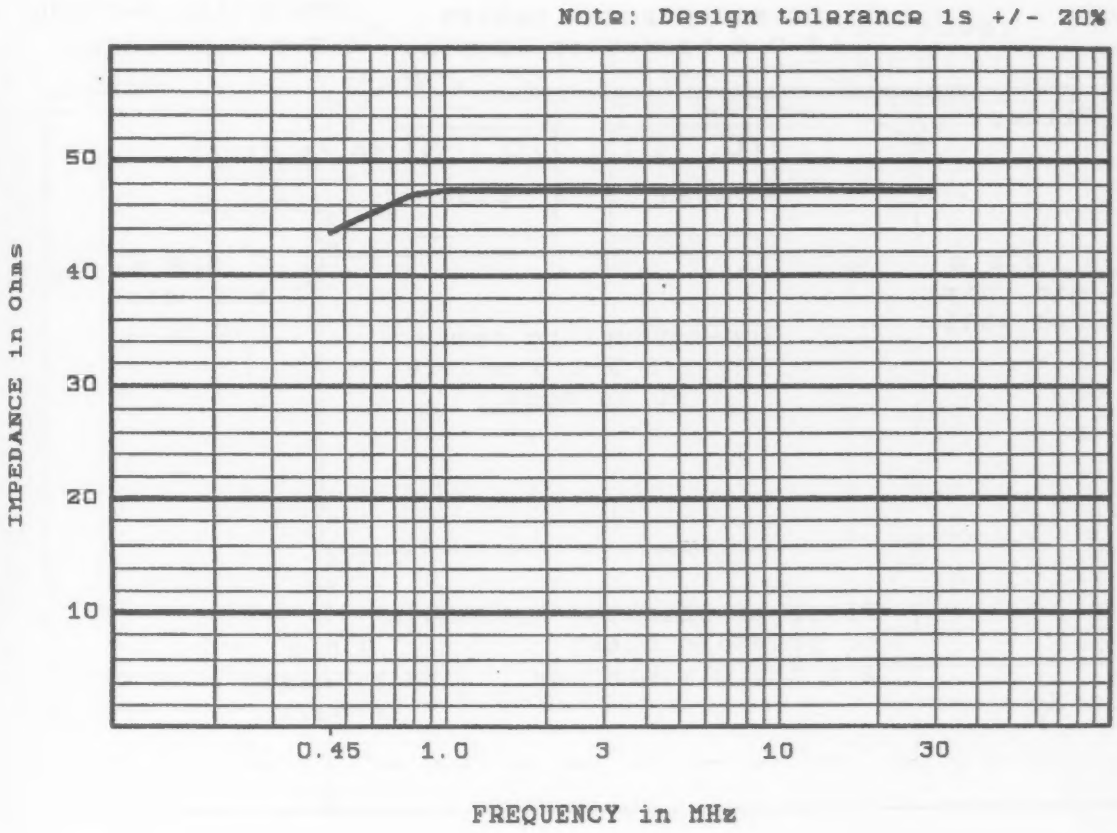

Figure 2 - Impedance Characteristics of 50 uH/ 50 ohm LISN

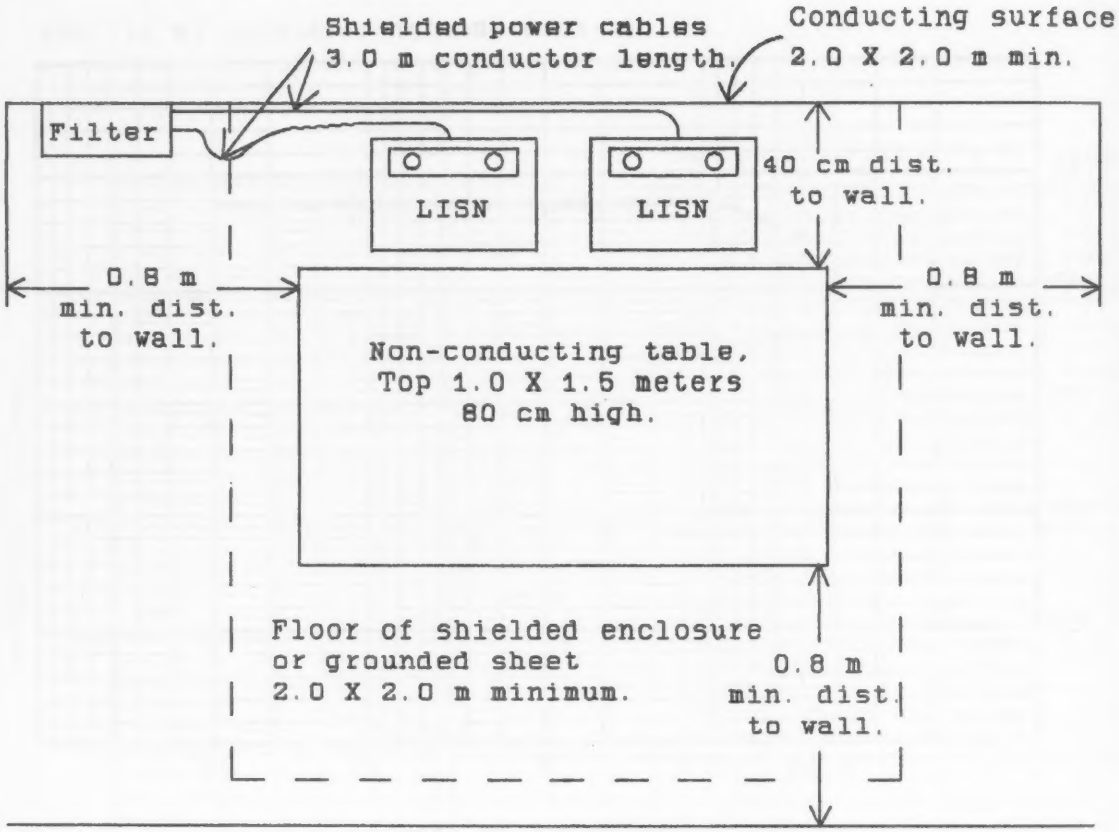

Figure 3 - Line Conducted Test Configuration for Table-top Equipment

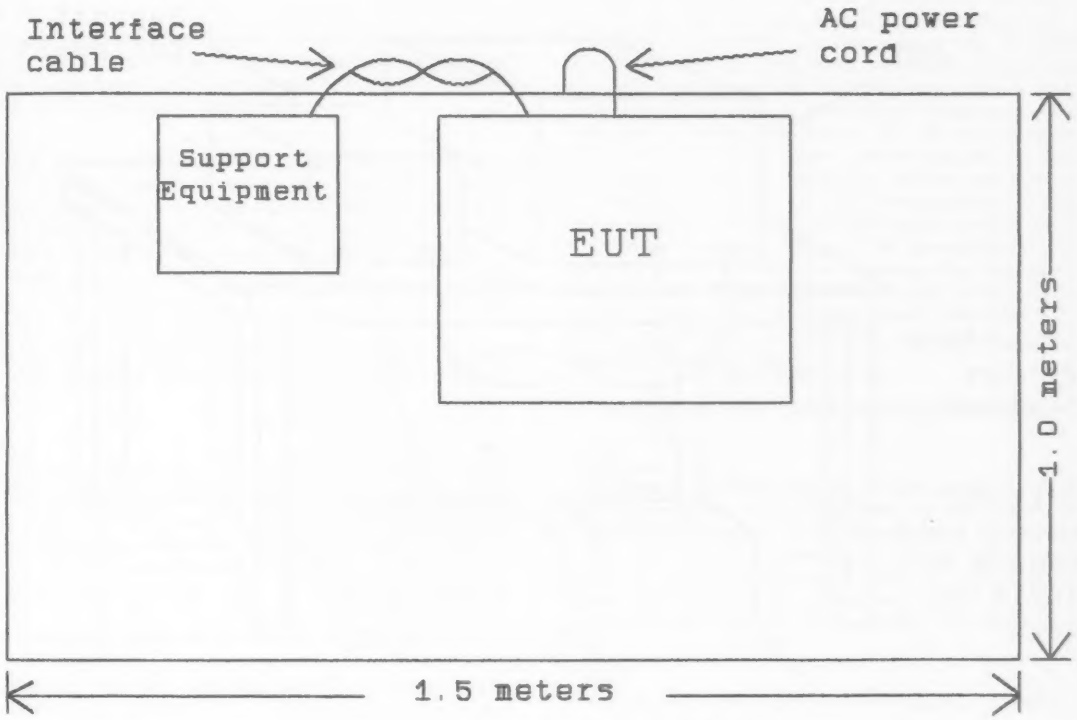

Figure 4 - Line Conducted Testing of Table-top Equipment

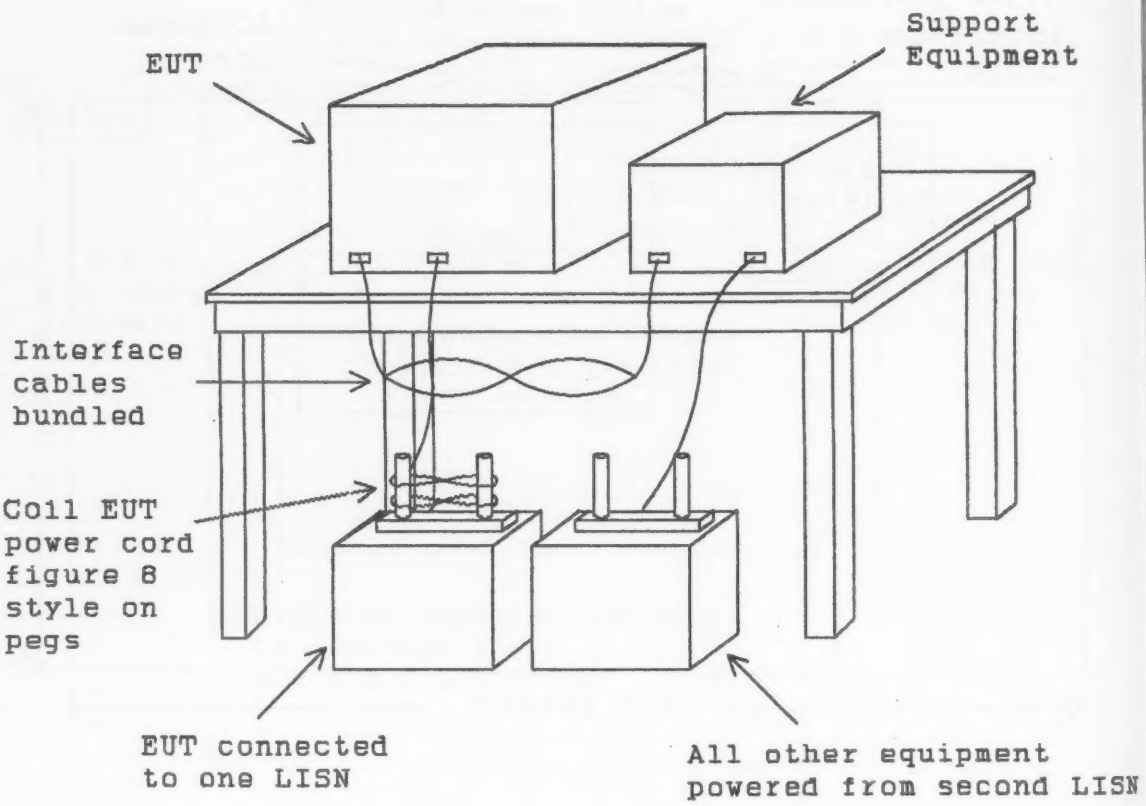
EUT
Support Equipment
Interface cables bundled
Coil EUT power cord figure 8 style on pegs
EUT connected to one LISN
All other equipment powered from second LISN

Figure 5 - Test Platform for Testing Table-top Equipment

APPENDIX 1 - Procedure for Checking Line Impedance Stabilization Networks

The impedance and isolation of each line impedance stabilization network (LISN) section is to be measured at least once a year using the following procedures:

1 MEASURING THE IMPEDANCE OF A LISN

Step 1)

This measurement is to be made with the LISN installed for measuring the line conducted EME of any device.

Step 2)

To avoid possible introduction of AC power from the supply line into the measuring instrument, disconnect the power connections (both neutral and hot lines) to the test set-up at the line side of the RF filter.

Note: Since the RF filter will isolate the LISN from power line impedance effects that can cause the apparent impedance of the LISN to vary beyond the acceptable limits, the RF filter should remain connected to the LISN during impedance measurements.

Step 3)

Connect a 50 ohm termination to every coaxial port on the LISN provided for connection to a measuring instrument.

Step 4)

The preferred instrument for measuring LISN impedance is a vector impedance meter that can be tuned continuously over the frequency range 450 kHz to 30 MHz. Other impedance measuring instruments may be used as long as they are continuously tunable over the required frequency range. If other types of impedance measuring instruments are used, it is acceptable to modify the procedure described herein as appropriate to suit the measuring instrument used.

Instruments that are capable only of measuring the impedance at a selected frequency *(i.e.* an instrument that is not continuously tunable) are not acceptable for these measurements since they do not facilitate detection of resonances at all frequencies over the specified range.

Using an adapter with short connections such as that shown in Photo 1, connect the measuring instrument directly to one terminal of the AC outlet on the load side of the LISN normally used to supply power to the EUT or peripheral, and measure the impedance of that side of the LISN, tuning the instrument over the frequency range between 450 kHz and 30 MHz so as to detect any impedance variations that may be due to resonances or other imperfections.

Step 5)

Plot the measured impedance curve for comparison with the tolerances shown in Figure 1 or 2 of this test procedure. If any measured value exceeds the permissible error tolerance, the LISN must be modified to reduce the error to an acceptable level.

Step 6)

Repeat steps 4 and 5 with the measuring instrument connected to the other terminal of the AC outlet on the LISN used to supply power to the EUT or peripheral.

Step 7)

If the LISN has three current carrying terminals on the AC outlet, repeat steps 4 and 5 for the third terminal.

Step 8)

If the LISN inductors have magnetic materials in their construction, make the following additional tests with AC current applied through the LISN to ensure that any variability due to effects of line current can be detected. Disconnect the RF filter from the LISN. Short together the load terminals of the LISN and feed current into the supply terminals from a low voltage transformer of suitable current rating *(See* Figure A). An AC ammeter in series with the circuit can be used to measure the applied current and a variable transformer can be used to regulate the amount of current by varying the primary voltage of the transformer. The high current circuit should not have a ground connection. Connect the measurement instrument as shown in Figure A. Measure the impedance of the LISN while supplying current at the LISNs maximum current rating. The impedance values measured by this technique will be approximately one-half of those observed in steps 5, 6, and 7.

2 MEASURING THE ISOLATION BETWEEN LISNs

Step 1)

The isolation between the AC supply ports of the EUT LISN and the corresponding ports of the other LISNs used in line conducted measurements must be checked to ensure that the EME entering the second LISN does not affect the measured levels of EME at the EUT LISN. Begin this procedure by performing steps 1, 2, and 3 of the impedance measurement procedure in 1 above.

Step 2)

Leave the RF filter disconnected from AC power at the line side of the filter.

Step 3)

Connect a signal generator to one terminal of the LISN port used to supply current to the EUT using an adaptor similar to that shown in Photo 1.

Step 4)

Using the same type of adapter, connect the measuring equipment to the corresponding AC supply port on the second LISN.

Step 5)

Measure the signal levels at the second LISN over the range 450 kHz to 30 MHz. The signal levels so measured at the second LISN should be at least 40 dB below the signal levels supplied to the EUT LISN.

Step 6)

Repeat Steps 4 and 5 for the corresponding AC supply ports on all LISNs used in line conducted measurements at the test facility.

Step 7)

Repeat Steps 3, 4, 5, and 6 for all current carrying terminals on the AC outlet of the EUT LISN.

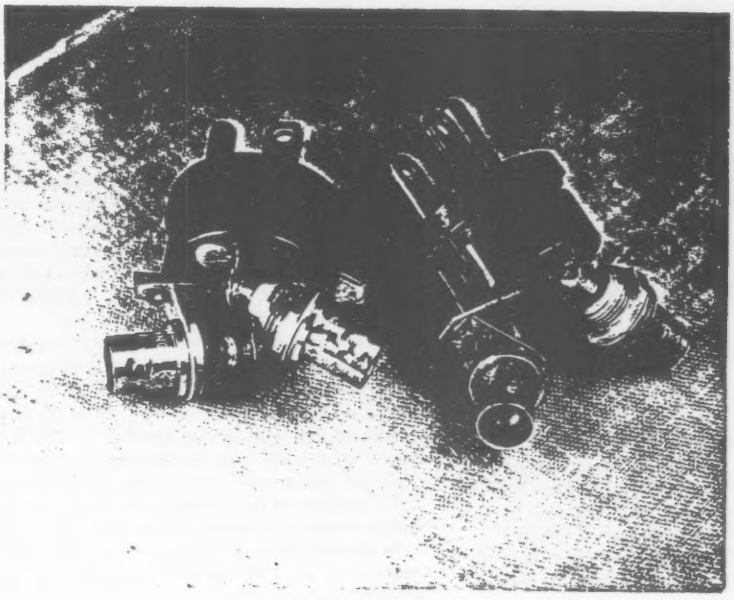

Photo 1

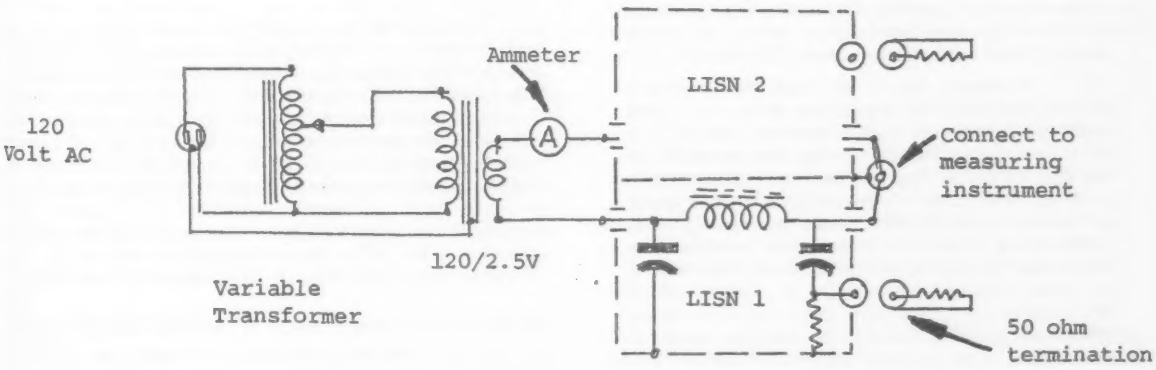

Figure A

APPENDIX 2 - Extract of FCC Part 15 Technical Rules for Unintentional Radiators.

Subpart A - General

Section 15.31 Measurement standards.

(f) To the extent practicable, the device under test shall be measured at the distance specified in the appropriate rule section. The distance specified corresponds to the horizontal distance between the measurement antenna and the closest point of the equipment under test, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system containing the equipment under test. The equipment under test, support equipment and any interconnecting cables shall be included within this boundary.

(1) At frequencies equal to or above 30 MHz, measurements may be performed at a distance closer than that specified provided this does not result in measurements taken in the near field. When performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance using an inverse linear distance extrapolation factor (20 dB/decade). Measurement at a distance greater than specified is not permitted unless the responsible party can demonstrate that measurements at the specified distance are impractical because of the size of the equipment, the location of the equipment, or other factors, or unless the responsible party can demonstrate that such a measurement would take place in the near field, as could occur when performing measurements on some large digital devices and perimeter protection systems. Measurements shall not be performed at a distance greater than 30 meters unless it can be demonstrated that measurement at a distance of 30 meters or less is impracticable and, further, that the signal level needed to be determined at the distance employed can be detected by the measuring equipment. When performing measurements at a distance greater than that specified, the results shall be interpolated to the specified distance using an inverse linear distance interpolation factor (20 dB/decade).

(2) At frequencies below 30 MHz, measurements may be performed at a distance closer than that specified in the regulations; however, an attempt should be made to avoid making measurements in the near field. Pending the development of an appropriate measurement procedure for measurements performed below 30 MHz, when performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance by either making measurements at a minimum of two distances on at least one radial to determine the proper extrapolation factor or by using the square of an inverse linear distance extrapolation factor (40 dB/decade).

(3) The applicant for a grant of certification shall specify the interpolation or extrapolation method used in the application filed with the Commission. For equipment subject to notification or verification, this information shall be retained with the measurement data.

(4) When measurement distances of 30 meters or less are specified in the regulations, the Commission will test the equipment at the distance specified unless measurement at that distance results in measurements being performed in the near field. When measurement distances of greater than 30 meters are specified in the regulations, the Commission will test the equipment at a closer distance, usually 30 meters, extrapolating the measured field strength to the specified distance using the methods shown in this Section.

(5) Measurements shall be performed at a sufficient number of radials around the equipment under test to determine the radial at which the field strength values of the radiated emissions are maximized. The maximum field strength at the frequency being measured shall be reported in an application for certification.

(g) Equipment under test shall be adjusted, using those controls that are readily accessible to or are intended to be accessible to the consumer, in such a manner as to maximize the level of the emissions. For those devices to which wire leads may be attached by the consumer, tests shall be performed with wire leads attached. The wire leads shall be of the length to be used with the equipment if that length is known. Otherwise, wire leads one meter in length shall be attached to the equipment. Longer wire leads may be employed if necessary to interconnect to associated peripherals.

(m) Measurements on intentional radiators or receivers, other than TV broadcast receivers, shall be performed and, if required, reported for each band in which the device can be operated with the device operating at the number of frequencies in each band specified in the following table:

Frequency range over which device operates	Number of frequencies	Location in the range of operation
1 MHz or less	1	Middle
1 to 10 MHz	2	1 near top and 1 near bottom
More than 10 MHz	3	1 near top, 1 near middle and 1 near bottom

(n) Measurements on TV broadcast receivers shall be performed with the receiver tuned to each VHF frequency and also shall include the following oscillator frequencies: 520, 550, 600, 650, 700, 750, 800, 850, 900 and 931 MHz. If measurements cannot be made on one or more of the latter UHF frequencies because of the presence of signals from licensed radio stations or for other reasons to be detailed in the measurement report, measurements shall be made with the receiver oscillator at a nearby frequency. If the receiver is not capable of receiving channels above 806 MHz, the measurements employing the oscillator frequencies 900 and 931 MHz may be omitted.

Section 15.33 Frequency range of radiated measurements.

(a) For an intentional radiator, the spectrum shall be investigated from the lowest radio frequency signal generated in the device, without going below 9 kHz, up to at least the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower. If the intentional radiator contains a digital device, regardless of whether this digital device controls the functions of the intentional radiator or the digital device is used for additional control or function purposes other than to enable

the operation of the intentional radiator, the frequency range shall be investigated up to the higher of the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator or the upper frequency of the measurement range applicable to the digital device, as shown in paragraph (b)(1) of this Section.

(b) For unintentional radiators:

(1) Except as otherwise indicated in paragraphs (b)(2) or (b)(3), for an unintentional radiator, including a digital device, the spectrum shall be investigated from the lowest radio frequency signal generated or used in the device, without going below the lowest frequency for which a radiated emission limit is specified, up to the frequency shown in the following table:

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 108	1000
108 - 500	2000
500 - 1000	5000
Above 1000	5th harmonic of the highest frequency or 40 GHz, whichever is lower

(2) A unintentional radiator, excluding a digital device, in which the highest frequency generated in the device, the highest frequency used in the device and the highest frequency on which the device operates or tunes are less than 30 MHz and which, in accordance with Section 15.109, is required to comply with standards on the level of radiated emissions within the frequency range 9 kHz to 30 MHz, such as a CB receiver or a device designed to conduct its radio frequency emissions via connecting wires or cables, e.g., a carrier current system not intended to radiate, shall be investigated from the lowest radio frequency generated or used in the device, without going below 9 kHz (25 MHz for CB receivers), up to the frequency shown in the following table. If the unintentional radiator contains a digital device, the upper frequency to be investigated shall be that shown in the table below or in the table in paragraph (b)(1) above, as based on both the highest frequency generated and the highest frequency used in the digital device, whichever range is higher.

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 10	400
10 - 30	500

(3) Except for a CB receiver, a receiver employing superheterodyne techniques shall be investigated from 30 MHz up to at least the second harmonic of the highest local oscillator frequency generated in the device. If such receiver is controlled by a digital device, the frequency range shall be investigated up to the higher of the second harmonic of the highest local oscillator frequency generated in the device or the upper frequency of the measurement range specified for the digital device in paragraph (b)(1) of this Section.

(c) The above specified frequency ranges of measurements apply to the measurement of radiated emissions and, in the case of receivers, the measurement to demonstrate compliance with the antenna conduction limits specified in Section 15.111. The frequency range of measurements for AC power line conducted limits is specified in Sections 15.107 and 15.207 and applies to all equipment subject to those regulations. In some cases, depending on the frequency(ies) generated and used by the equipment, only signals conducted onto the AC power lines are required to be measured.

(d) Particular attention should be paid to harmonics and subharmonics of the fundamental frequency as well as to those frequencies removed from the fundamental by multiples of the oscillator frequency. Radiation at the frequencies of multiplier stages should also be checked.

Section 15.35 Emission limits.

The conducted and radiated emission limits shown in this Part are based on the following, unless otherwise specified elsewhere in this Part:

(a) On any frequency or frequencies below or equal to 1000 MHz, the limits shown are based on measuring equipment employing a CISPR quasi-peak detector function and related measurement bandwidths, unless otherwise specified. The specifications for the measuring instrument using the CISPR quasi-peak detector can be found in Publication 16 of the International Special Committee on Radio Interference (CISPR) of the International Electrotechnical Commission. As an alternative to CISPR quasi-peak measurements, the responsible party, at its option, may demonstrate compliance with the emission limits using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, as long as the same bandwidths as indicated for CISPR quasi-peak measurements are employed.

Note: For pulse modulated devices with a pulse-repetition frequency of 20 Hz or less and for which CISPR quasi-peak measurements are specified, compliance with the regulations shall be demonstrated using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, using the same measurement bandwidths that are indicated for CISPR quasi-peak measurements.

(b) On any frequency or frequencies above 1000 MHz, the radiated limits shown are based on the use of measurement instrumentation employing an average detector function. When average radiated emission measurements are specified in the regulations, including emission measurements below 1000 MHz, there is also a limit on the radio frequency emissions, as measured using instrumentation with a peak detector function, corresponding to 20 dB above the maximum permitted average limit for the

frequency being investigated. Measurements of AC power line conducted emissions are performed using a CISPR quasi-peak detector, even for devices for which average radiated emission measurements are specified.

(c) When the radiated emission limits are expressed in terms of the average value of the emission, and pulsed operation is employed, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative (provided the transmitter operates for longer than 0.1 seconds) or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the average absolute voltage during a 0.1 second interval during which the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for certification or shall be retained in the measurement data file for equipment subject to notification or verification.

Section 15.37 Transition provisions for compliance with the rules.

Equipment may be authorized, manufactured and imported under the rules in effect prior to (insert date 60 days after date of publication in the Federal Register) in accordance with the following schedules:

(a) For all intentional and unintentional radiators, except for receivers: Radio frequency equipment verified by the responsible party or for which an application for a grant of equipment authorization is submitted to the Commission on or after (insert date 3 years after effective date of the R&O) shall comply with the regulations specified in this Part. Radio frequency equipment that is manufactured or imported on or after (insert date 5 years after effective date of the R&O) shall comply with the regulations specified in this Part.

(b) For receivers: Receivers subject to the regulations in this Part that are manufactured or imported on or after (insert date 10 years after effective date of the R&O) shall comply with the regulations specified in this Part. However, if a receiver is associated with a transmitter that could not have been authorized under the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register), e.g., a transmitter operating under the provisions of Sections 15.209 or 15.249 (below 960 MHz), the transition provisions in this Section do not apply. Such receivers must comply with the regulations in this Part.

(c) There are no restrictions on the operation or marketing of equipment complying with the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register).

Subpart B - Unintentional Radiators

Section 15.107 Conducted limits.

(a) Except for Class A digital devices, for equipment that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) For a Class A digital device that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed the limits in the following table. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals. The lower limit applies at the band edges.

Frequency of Emission (MHz)	Conducted Limit (microvolts)
0.45 - 1.705	1000
1.705- 30.0	3000

(c) For carrier current systems used as unintentional radiators whose emissions are contained within the frequency range 450 kHz to 30 MHz, the provisions of this Section shall not apply. Such systems are subject to radiated emission limits as provided in Section 15.109(e).

(d) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.109 Radiated emission limits.

(a) Except for Class A digital devices, the field strength of radiated emissions from unintentional radiators at a distance of 3 meters shall not exceed the following values:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	100
88 - 216	150
216 - 960	200
Above 960	500

(b) The field strength of radiated emissions from a Class A digital device, as determined at a distance of 10 meters, shall not exceed the following:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	90
88 - 216	150
216 - 960	210
Above 960	300

(c) In the emission tables above, the tighter limit applies at the band edges. Sections 15.33 and 15.35 which specify the frequency range over which radiated emissions are to be measured and the detector functions and other measurement standards apply.

(d) For CB receivers, the field strength of radiated emissions within the frequency range of 25 - 30 MHz shall not exceed 40 microvolts/meter at a distance of 3 meters. The field strength of radiated emissions above 30 MHz from such devices shall comply with the limits in paragraph (a).

(e) Carrier current systems used as unintentional radiators or other unintentional radiators that are designed to conduct their radio frequency emissions via connecting wires or cables and that operate in the frequency range of 9 kHz to 30 MHz, including devices that deliver the radio frequency energy to transducers, such as ultrasonic devices not covered under Part 18 of this Chapter, shall comply with the radiated emission limits for intentional radiators provided in Section 15.209 for the frequency range of 9 kHz to 30 MHz. At frequencies above 30 MHz, the provisions of paragraph (a) of this Section apply.

(f) For a receiver which employs terminals for the connection of an external receiving antenna, the receiver shall be tested to demonstrate compliance with the provisions of this Section with an antenna connected to the antenna terminals unless the antenna conducted power is measured as specified in Section 15.111(a). If a permanently attached receiving antenna is used, the receiver shall be tested to demonstrate compliance with the provisions of this Section.

Section 15.111 Antenna power conduction limits for receivers.

(a) In addition to the radiated emission limits, receivers that operate (tune) in the frequency range 30 to 960 MHz and CB receivers that provide terminals for the connection of an external receiving antenna may be tested to demonstrate compliance with the provisions of Section 15.109 with the antenna terminals shielded and terminated with a resistive termination equal to the impedance specified for the antenna, provided these receivers also comply with the following: with the receiver antenna terminal connected to a resistive termination equal to the impedance specified or employed for the antenna, the power at the antenna terminal at any frequency within the range of measurements specified in Section 15.33 shall not exceed 2.0 nanowatts.

(b) CB receivers and receivers that operate (tune) in the frequency range 30 to 960 MHz that are provided only with a permanently attached antenna shall comply with the radiated emission limitations in this Part, as measured with the antenna attached.

Section 15.115 TV interface devices, including cable system terminal devices.

(a) Measurements of the radiated emissions of a TV interface device shall be conducted with the output terminal(s) of the device terminated by a resistance equal to the rated output impedance. The emanations of a TV interface device incorporating an intentional radiator shall not exceed the limits in Section 15.109 or Subpart C of this Part, whichever is higher for each frequency. Where it is possible to determine which portion of the device is contributing a particular radio frequency emission, the emissions from the TV interface device portion shall comply with the emission limits in Section 15.109, and the emissions from the intentional radiator shall comply with Subpart C of this Part.

(b) Output signal limits:

(1) At any RF output terminal, the maximum measured RMS voltage, in microvolts, corresponding to the peak envelope power of the modulated signal during maximum amplitude peaks across a resistance (R in ohms) matching the rated output impedance of the TV interface device, shall not exceed the following:

(i) For a cable system terminal device or a TV interface device used with a master antenna, 692.8 times the square root of (R) for the video signal and 155 times the square root of (R) for the audio signal.

(ii) For all other TV interface devices, 346.4 times the square root of (R) for the video signal and 77.5 times the square root of (R) for the audio signal.

(2) At any RF output terminal, the maximum measured RMS voltage, in microvolts, corresponding to the peak envelope power of the modulated signal during maximum amplitude peaks across a resistance (R in ohms) matching the rated output impedance of the TV interface device, of any emission appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency on which the TV interface device is operated shall not exceed the following:

(i) For a cable system terminal device or a TV interface device used with a master antenna, 692.8 times the square root of (R).

(ii) For all other TV interface devices, 10.95 times the square root of (R).

(3) The term "master antenna" used in this paragraph refers to TV interface devices employed for central distribution within large buildings such as apartments, hospitals, office buildings, etc.

(c) A TV interface device shall be equipped with a transfer switch for connecting the antenna terminals of a receiver selectively either to the receiving antenna or to the radio frequency output of the TV interface device, subject to the following:

(1) When measured in any of its set positions, transfer switches shall comply with the following requirements:

(i) For a cable system terminal device or a TV interface device equipped for use with a cable system or a master antenna, as defined in paragraph (b)(3), the isolation between the antenna and cable input terminals shall be at least 80 dB from 54 to 216 MHz and at least 60 dB from 216 to 550 MHz. The 80 dB limit applies at 216 MHz. In the case of a transfer switch requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted.

(ii) For all other TV interface devices, the maximum voltage, corresponding to the peak envelope power of the modulated video signal during maximum amplitude peaks, in microvolts, appearing at the receiving antenna input terminals when terminated with a resistance (R in ohms) matching the rated impedance of the antenna input of the switch, shall not exceed 0.346 times the square root of (R).

(iii) Measurement to determine compliance with the transfer switch limits shall be made using a connecting cable, where required, between the TV interface device and the transfer switch of the type and length 1) provided with the TV interface device, 2) recommended in the instruction manual, or 3) normally employed by the consumer.

(2) A TV interface device shall be designed and constructed, to the extent practicable, so as to preclude the possibility that the consumer may inadvertently attach the output of the device to the receiving antenna, if any, without first going through the transfer switch.

(3) A transfer switch is not required for a TV interface device that, when connected, results in the user no longer having any need to receive standard over-the-air broadcast signals via a separate antenna. A transfer switch is not required to be marketed with a cable system terminal device unless that device provides for the connection of an external antenna. A transfer switch is not required for a device that is intended to be used as an accessory to an authorized TV interface device.

(4) An actual transfer switch is not required for a TV interface device, including a cable system terminal device, that has an antenna input terminal(s); provided, the circuitry following the antenna input terminal(s) has sufficient bandwidth to allow the reception of all TV broadcast channels authorized under Part 73 of this Chapter and: for a cable system terminal device that can alternate between the reception of cable television service and an antenna, compliance with the isolation requirement specified in paragraph (c)(1)(i) can be demonstrated; and, for all other TV interface devices, the maximum voltage appearing at the antenna terminal(s) does not exceed the limit in paragraph (c)(1)(ii).

(5) If a transfer switch is not required, the following label shall be used in addition to the label shown in Section 15.19(a):

This device is intended to be attached to a receiver that is not used to receive over-the-air broadcast signals. Connection of this device in any other fashion may cause harmful interference to radio communications and is in violation of the FCC Rules, Part 15.

(d) A TV interface device, including a cable system terminal device, shall incorporate circuitry to automatically prevent emanations from the device from exceeding the technical specifications in this Part. These circuits shall be adequate to accomplish their functions when the TV interface device is presented, if applicable, with video input signal levels in the range of one to five volts; this requirement is not applicable to a TV interface device that uses a built-in signal source and has no provisions for the connection of an external signal source. For devices that contain provisions for an external signal source but do not contain provisions for the input of an external baseband signal, e.g., some cable system terminal devices, compliance with the provisions of this paragraph shall be demonstrated with a radio frequency input signal of 0 to 25 dBmV.

FOOTNOTES

[1] *See First Report and Order* in GEN. Docket No. 87-389, *supra*, at paras. 15-16

[2] *OET Bulletin MP-2*, "Measurement of UHF Noise Figure of TV Receivers."

[3] OET Bulletin MP-9, "FCC Procedure for Measuring Cable Television Switch Isolation."

[4] *See Report and Order* in GEN. Docket No. 87-389, adopted March 30, 1989, FCCxxx.

[5] *See First Report and Order* in GEN. Docket No. 87-389, *supra*, at paras.15-16.

[6] Measurement of digital devices, CB receivers, carrier current systems and cable input selector switches for compliance with the technical standards requires special procedures not applicable to other types of unintentional radiators. In addition, measurement of the UHF noise figure of TV receivers requires a special procedure. Measurement of these devices and TV UHF noise figure therefore will continue to be addressed in separate measurement procedures. Measurement procedures for digital devices are addressed in FCC/OET TP-5. Carrier current systems and CB receivers will be addressed in FCC/OET TP-2. We will continue to use MP-2 to evaluate cable input selector switches, and MP-9 to evaluate the UHF noise figure of TV receivers for compliance with the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-117

In the Matter of

FCC Procedure For Measuring RF Emissions from Intentional Radiators with Periodic Operation and Associated Superregenerative Receivers

NOTICE OF PROPOSED RULE MAKING

Adopted: May 12, 1989; Released: June 29, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to establish a new procedure for measuring electromagnetic emissions from periodic transmitters operating under Part 15 of the Commission's rules and from superregenerative receivers associated with such devices. The new procedure, "FCC Procedure for Measuring RF Emissions from Intentional Radiators with Periodic Operation and Associated Superregenerative Receivers" FCC/OET TP-6 (TP-6) is intended to set forth uniform methods for testing these devices for compliance with the technical standards adopted in the Commission's recent comprehensive revision of Part 15.[1]

BACKGROUND

2. Periodic transmitters are Part 15 intentional radiators that intermittently transmit pulsed signals on a single frequency.[2] The use of pulsed transmissions permits such devices to operate at a higher peak signal level under the Commission's rules than devices that use transmission techniques that continuously emit non-pulsed signals such as conventional FM transmission systems. The higher signal level is permissible because the signal levels, in times the pulses are on and off, average to a level that is acceptable under the rules. Examples of periodic emitters include, but are not limited to, devices for burglar, security, fire or other emergency alarm, remote control of a door opener, and remote control of a switch.

3. Periodic transmitters are used almost exclusively in conjunction with superregenerative receivers. This type of receiver uses positive feedback techniques to achieve improved signal gain and sensitivity. Superregenerative receivers are regulated as unintentional radiators under the Part 15 rules.[3]

4. Because of the non-conventional signaling technique used by periodic transmitters, the Commission maintains a special procedure for measuring these devices for compliance with the Part 15 technical standards. This procedure also provides instructions for measuring superregenerative receivers for compliance with the standards for unintentional radiators. The current measurement procedure for periodic transmitters and their associated superregenerative receivers is set forth in OET Bulletin MP-1 (MP-1).[4]

5. In the *First Report and Order* in Docket No. 87-389 (Docket No. 87-389), the Commission, *inter alia*, revised a number of the technical standards that apply to periodic transmitters and their associated superregenerative receivers, including the limits on permissible line-conducted and radiated EME, the permissible bandwidth occupied by their fundamental signal, the permissible operating frequencies and the permissible frequency deviation.[5] The Commission also established certain specifications for measuring RF devices for compliance with the Part 15 technical standards. For example, the rules were amended to specify the use of instrumentation with peak, average, and quasi-peak detector functions, extend the range of frequencies to be measured for EME to include frequencies above 1000 MHz, standardize the scan height if the measuring receiver antenna at 1 to 4 meters and establish the measurement distance for most intentional radiators at a uniform 3 meters.

DISCUSSION

6. The new Part 15 rules permit the operation of new types of periodic transmitters for which new measurement procedures must be developed. In addition, the measurement procedures for the types of such devices authorized under the existing rules will need to be revised when the new Part 15 rules become effective. The measurement procedure TP-6 is designed to address these needs for both new and modified test procedures.[6] The new procedure, which is presented in Appendix A, would provide measurement instructions for all transmitters using pulsed modulation techniques and their associated superregenerative receivers, except spread spectrum devices. The proposed TP-6 would have the full force and effect of FCC regulations. In order to make the test procedures readily available and to clarify that they have the force of rules, we intend to include the test procedures in the Commission's rules.

7. The proposed TP-6 specifies the test environment, test instrumentation, configuration of the equipment under test and instructions for setting up and performing measurements to be used in evaluating peiodic intentional radiators and associated superregenerative receivers for compliance with Part 15 technical standards. Instructions are provided for measuring: 1) line conducted EME; 2) receiver antenna conducted power measurements; 3) radiated EME; 4) transmitter bandwidth; 5) transmitter frequency stability; and 6) transmitter duty cycle. The proposed TP-6 also provides instructions for recording/reporting the test results.

8. The provisions of the proposed measurement procedure differ from those of the existing MP-1 procedure in a number of respects. Some of these changes reflect the new measurement standards that were adopted in Docket No. 87-389. For example, the proposed TP-6 specifies using a CISPR quasi-peak detector to measure the line-conducted EME and the radiated EME below 1000 MHz for equipment newly authorized under Docket No. 87-389.[7] The proposed TP-6 specifies the use of both the average and peak detector functions for measuring EME from types of devices first authorized under the former Part 15 rules.

Under the existing procedures, these measurements are performed using only an average detector. In addition, the proposed test for line-conducted EME specifies measurements over the range .45 to 30 MHz, whereas MP-1 requires such measurements over the more limited range. Radiated measurements above 1000 MHz, would be performed using both the average and peak detector functions. Finally the new procedure would standardize the distance of the measuring receivers antenna from the equipment under test in radiated EME measurements at 3 meters. This differs from MP-1, which specifies distances from 3 to 30 meters depending on the device being tested.

9. The proposed TP-6 also includes a number of refinements intended to improve the quality and consistency of the measurement results. For example under the proposed procedure, a 50 uH/ 50 ohm line impedance stabilization network (LISN) would be used in the line-conducted EME tests instead of the 50 uH/50 ohm LISN currently used. Also, radiated EME tests uniformly would be conducted with the receiving antenna varied in height from 1 to 4 meters rather than the current practice of a variety of antenna heights depending on the device under test.

10. Comments are requested on the degree to which the proposed measurement procedure would provide an effective means of evaluating periodic transmitters and associated receivers for compliance with the rules. Comments are also sought on the burden, in terms of both direct costs and time to complete tests, this procedure would impose on those who evaluate Part 15 periodic intentional radiators and associated superregenerative receivers. We invite suggestions for minimizing this burden in a manner that would not compromise the quality and consistency of the test measurements. In addition, comments are requested on whether the format of the test procedure is clear and whether the level of guidance furnished in the procedure is sufficient to permit the procedures to readily performed. Interested parties are requested to suggest changes which would improve the accuracy and repeatability of the test results when measurements are performed at different facilities.

11. In conclusion, we welcome comments on all aspects of the proposed test procedures and any other issues that may bear on the effectiveness of these procedures for safeguarding the radio frequency environment with the minimum burden on equipment suppliers. However, we do not intend to consider comments that deal with issues that were previously decided or are being addressed in related proceedings. In particular, we will not consider comments proposing changes in the technical standards for periodic transmitters and associated receivers.

PROCEDURAL MATTERS

12. Under the procedures set out in Section 1.415 of the Commission's Rules, interested persons may file comments on or before **August 21, 1989,** and reply comments on or before **September 5, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided such information or writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

13. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and five (5) copies of their comments and other materials. Participants wishing each Commissioner to have a copy of their comments should file an original and 11 copies. Members of the public who wish to express their comments are given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters in Washington, D.C.

14. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that the matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

15. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

INITIALREGULATORY FLEXIBILITY ANALYSIS

16. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and Purpose of this action: The purpose of this proposed procedure is to set forth uniform methods for testing periodic transmitters and associated receivers for compliance with the recent comprehensive revision of Part 15 of the Commission's Rules adopted in the *First Report and Order* in GEN. Docket No. 87-389. Since the existing measurement procedures used to evaluate these

devices are not satisfactory for evaluating devices under the revised rules, it is necessary to develop a new measurement procedure.

II. The objectives: Our objective in proposing this new measurement procedure for intentional radiators is to provide the basis for a consistent and repeatable test program for evaluating these devices for compliance with the newly revised rules.

III. Legal Basis: The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304, and 307 of the Communications Act of 1934, as amended.

IV. Description of potential impact and number of small entities affected: We believe that the proposed measurement procedure will benefit manufactures and test laboratories by speeding testing and reducing compliance costs. The proposed test procedure would modify the present procedures for measuring intentional radiators. Its adoption potentially would affect all manufacturers of intentional radiators and laboratories performing equipment authorization tests on such devices. However, the exact number of small entities affected is not known.

V. Recording, record keeping and other compliance requirements: The proposed measurement procedures would increase the reporting/record keeping requirements of parties responsible for Part 15 intentional radiators to the extent that the range of frequencies that must be measured has been increased slightly. However the format and content of the reporting/ recording requirements has not been significantly modified.

VI. Federal rules which overlap or conflict with this rule: None.

VII. Any significant alternates minimizing impact on small entities and consistent with the stated objectives: None.

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the office of Management and Budget as prescribed by the Act.

18. For further information on this proceeding, contact Hugh Van Tuyl, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD. 21046, telephone (301) 725-1585. For further information concerning Part 15 of the Commissions Rules contact, FCC, Technical Standards Branch, Room 7122, 2025 M St. N.W., Washington D.C. 20554, telephone (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A -- NPRM IN FCC GENERAL DOCKET 89-117

THIS DOCUMENT IS INTENDED TO SOLICIT COMMENTS AND THE PROCEDURES CONTAINED HEREIN MAY NOT BE USED FOR COMPLIANCE TESTING UNTIL ADOPTED BY THE COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION

PROPOSED
FCC PROCEDURE FOR MEASURING RF EMISSIONS FROM INTENTIONAL RADIATORS WITH PERIODIC OPERATION AND ASSOCIATED SUPERREGENERATIVE RECEIVERS

Federal Communications Commission
Authorization and Evaluation Division
7435 Oakland Mills Road
Columbia, MD 21046

FCC/OET TP-6 (1989) PROPOSED MAY 1989

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SECTION I - GENERAL

1 INTRODUCTION

The procedure described herein sets forth uniform methods for testing periodic emitters, i.e., transmitters employing pulse modulation techniques, and associated superregenerative receivers for compliance with the limits for conducted electromagnetic emissions (EME), limits for radiated EME above 30 MHz, and other technical operating requirements of the applicable portions of Part 15 of the FCC Rules and Regulations, 47 CFR Part 15. This document describes the environment, test instrumentation and equipment, requirements for the configuration of the equipment under test (EUT), test set-up, and measurement steps to be used in the testing of these devices for compliance with the relevant FCC technical rules. Periodic emitters and associated superregenerative receivers also are subject to the FCC limits for radiated EME below 30 MHz. Procedures for measuring these devices for radiated EME below 30 MHz are described in an associated publication, FCC/OET TP-2.

1.1 Applicability

These procedures are to be used to determine compliance of periodic emitters and associated superregenerative receivers with the EME limits and other technical requirements specified in Part 15 of the FCC rules. Other measurement procedures may be used provided that the party responsible for the equipment demonstrates that the methods used yield results that are expected to be the same as the results that would be obtained using these procedures. In the event of a dispute, the results of tests performed in accordance with the procedures described herein will prevail.

1.2 Definitions

The definitions in Parts 2 and 15 of the FCC rules and the following definitions apply for purposes of these test procedures. The definitions in the IEEE Standard Dictionary of Electrical and Electronics Terms, 2nd Edition, IEEE-100-1984, also apply. Where there are differences between the IEEE definitions and the FCC definitions, as set forth in the rules and herein, the FCC definitions shall apply.

1.2.1 *Duty cycle for pulsed emissions* - The ratio of the sum of all pulse durations to the total period, during a specified period of operation. The duty cycle will be determined on the basis of one complete pulse train for pulse trains not exceeding 100 milliseconds. Where the pulse train exceeds 100 milliseconds, the duty cycle will be determined on the basis of the 100 millisecond interval with the highest average value of emission.

1.2.2 *Equipment under test (EUT)* - A representative sample of a device or system under test in a standard test configuration. This includes the periodic emitter or superregenerative receiver, system components, support equipment and connecting cables.

1.2.3 *Line Spectrum* - The individual Fourier frequency components of a signal. In order to observe a line spectrum, the resolution bandwidth of the measuring instrument must be less than the frequency spacing of the components.

1.2.4 *Pulse Desensitization* - The apparent reduction in peak amplitude of a pulsed CW signal as viewed on a measuring instrument caused by the distribution of its energy over many spectral components. The manufacturer of the measuring instrument should be consulted for more information on pulse desensitization.

1.2.5 *Pulse Spectrum* - A combination time and frequency domain representation of a signal where the individual frequency components can not be resolved, but the envelope of the signal can be seen. In order to observe a pulse spectrum, the resolution bandwidth of the measuring instrument must be greater than the frequency spacing of the individual Fourier components, but narrow compared to the width of the envelope of the signal.

1.2.6 *Simulator* - A device used in lieu of an actual product accessory which emulates the impedances, RF signals, electrical characteristics and interaction with the EUT of that product accessory.

1.2.7 *Support Equipment* - An attachment or accessory to which the equipment under test is physically connected for auxiliary control or product enhancement.

1.3 Requests for Interpretations

Parties seeking interpretations or having questions about Part 15 regulations are invited to write to:

Chief, Technical Standards Branch
Federal Communications Commission
Room 7122
2025 M Street, N.W.
Washington, D.C. 20554

Questions concerning the procedures set forth herein should be addressed to:

Chief, Authorization and Evaluation Division
F.C.C. Laboratory
7435 Oakland Mills Road
Columbia, Maryland 21046.

2 TEST ENVIRONMENT

2.1 Test Sites

Conducted EME measurements may be made at any suitable facility, including a shielded room, provided the facility otherwise meets the requirements for a proper test environment as specified below. Radiated EME measurements of the EUT should be made on an open area test site, or its equivalent, meeting the minimum requirements described in FCC/OET Bulletin 55 (see reference [1]). An alternative site may be used for radiated EME measurements provided that the results are satisfactorily correlated to those that would be obtained on an open area test site. A shielded room is not acceptable for making radiated EME measurements unless it is properly lined with EME absorbing material to eliminate reflections of emissions.

2.2 Ambient EME

It is desirable that the level of both the conducted and radiated ambient EME at the test site be at least 6 dB below the FCC limits applicable to the EUT. It is, of course, not always possible to meet this condition. If the ambient field strength and/or power-line level at some frequencies within the specified measurement ranges are too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements at the closest distance possible as permitted by near field considerations and convert the results to the equivalent level at the specified limit distance.

2) Perform measurements in critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

3) Perform measurements in a room lined with EME absorbing material. Note: Measurements made in a non-absorber lined shielded (metal) enclosure are not acceptable for the purpose of determining compliance with radiated EME limits.

4) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

5) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EUT.

2.3 Temperature

The ambient temperature of the testing area should be within the range of 4 to 35 degrees Celsius (40 to 95 degrees Fahrenheit) unless the particular equipment requirements specify testing over a different temperature range.

2.4 Ground Plane

A ground plane or screen is required when line conducted EME tests are performed at laboratory facilities. This ground plane is to consist of a conducting floor and at least one vertical earth-grounded conducting surface, e.g. the metal floor and a metal wall of a shielded test chamber. Each of these conducting surfaces is to be at least 2.0 x 2.0 meters in size. The part of the ground plane on the floor of the facility is to be covered by insulating material at least 3 millimeters thick, e.g. rubber matting or floor tile.

The use of a metal ground plane is strongly recommended for measurement of radiated EME. A ground plane is required if the test site is elevated above ground level (such as on a rooftop or raised platform), or located on pavement (such as asphalt or concrete). See OET Bulletin 55 in reference [1] for information regarding the size and material for a ground plane. Open area test sites are likely to need a ground plane when any of the following conditions exist at the site:

1) The terrain is discontinuous.

2) The terrain is subject to extreme seasonal variations in ground conductivity.

3) There are unburied power or control cables on the site.

4) The soil is sandy or rocky.

A ground plane should only be used for on-site testing when it will be a permanent part of the installation.

3 TEST INSTRUMENTATION AND EQUIPMENT

3.1 Measuring Instruments

The following instrumentation is to be used:

1) Quasi-peak EME measurements below 1000 MHz are to be made with a radio noise meter conforming to the specifications in reference [2].

2) The instrumentation to be used for average and peak measurements depends on the type of signal being measured:

a. For a Pulse Spectrum: A spectrum analyzer operating in the peak mode is to be used. If a bandwidth large enough to observe the true peak level is not available, then a pulse desensitization factor shall be applied to the spectrum analyzer reading after the spectrum analyzer has been adjusted so that it is operating in the pulse spectrum mode. (Note: The manufacturer of the measuring instrument should be consulted for information on calculating pulse desensitization factors).

b. For a Line Spectrum: A radio noise meter having the detector set to the peak function is to be used. If the resolution bandwidth cannot be set narrow enough to resolve the spectral components, a spectrum analyzer set to operate in the peak mode should be used.

3) Transmitter bandwidth measurements are to be made with a spectrum analyzer.

4) Transmitter duty cycle measurements are to be made with a sampling oscilloscope.

5) Transmitter frequency measurements are to be made with a frequency counter.

Other instrumentation may be used for making these measurements. It is preferred that other measurement instruments also conform to the specifications in references [2] and [3]. In all cases, measurements taken with a measuring instrument that meets the above specifications will take precedence.

When a spectrum analyzer is used as the measuring instrument, appropriate accessories should be employed to provide sufficient sensitivity and overload protection to insure accurate and repeatable measurements of all emissions over the specified frequency range. The accessories needed will depend upon the specific measurement task and may include preamplifiers for improving sensitivity, filters and attenuators for overload protection, and additional quasi-peak detection circuitry. In this case, overload is harmonic distortion, intermodulation, or gain compression of spectrum analyzer input signals. If a post-detector filter is used, its bandwidth must be wide enough so as not to affect peak detector readings. Prior to taking final measurements, it may be necessary to take precautions to ensure that the spectrum analyzer operates linearly. The user's manual of the spectrum analyzer should be reviewed for instructions and guidance in this area. Application notes on the use of spectrum analyzers and other measurement instruments also are available from several manufacturers of this type of equipment.

Automatic scan techniques may be used, but the maximum scan speed is to be limited by the response time of the measuring system and, where applicable, by the repetition rate of the emissions being measured to ensure that the maximum levels of all emissions are measured. Where such techniques are employed, extreme caution must be exercised to ensure that each emission is maximized.

3.2 Antennas

Measurements of radiated EME are to be made using the following antennas:

Frequency Range	Antenna Type
30 to 1000 MHz	Tuned half-wave dipole
Above 1000 MHz	Linearly polarized horn

Other types of linearly polarized antennas may be used provided that the measurement results can be correlated to measurements made with the listed antennas. However, dipole and horn antennas are the reference antennas.

It is recommended that the measurement antenna be mounted on a stand that will facilitate raising and lowering of the antenna from 1 to 4 meters in height in an even, continuous manner and allow convenient reorienting of the antenna from the horizontal to the vertical plane.

3.3 Line Impedance Stabilization Network (LISN)

Measurements of the RF noise voltage on each conductor of the AC power cord of the EUT are to be made with the EUT connected to the public utility power lines through a line impedance stabilization network (LISN). All devices are to use a LISN having the impedance characteristics shown in Figure 1 (50 uH/50 ohms). Any network that provides the impedance characteristics shown in Figure 1 may be used. In addition, support equipment is to be connected to the power service through one or more additional LISNs of the same type used to power the EUT.

A separate LISN is required for each current carrying conductor in the EUT. AC power to the LISN is to be filtered to eliminate ambient RF voltages. An RF filter of the type used on the AC power lines feeding into a screen or shielded room should be installed on the AC utility power source for this set-up. The length of power line between each LISN and the RF filter is to be 3.0 meters and this line must be shielded. Electrically bond the LISN enclosure(s) and the RF filter to the ground plane. Each LISN unit is to have a coaxial-type connector that provides a 50 ohm terminating impedance for connection of the measuring instrumentation. A LISN is not to be used during radiated EME measurements since this usage involve measurements outside its designed frequency range.

Commercial LISNs are either single section units with screw terminals or multi-section units that may have either screw terminals or an integral AC outlet. Where it is necessary to add an external AC outlet to a LISN with screw terminals, the outlet must be connected with low-impedance leads that are the minimum length necessary to connect the EUT to the LISN, e.g. 3 inches. The short leads are necessary to maintain the rated impedance of the LISN.

3.4 Test Platforms

During testing, hand-held or table-top devices are to be placed on a non-conducting rectangular table or platform with a top surface 1.0 x 1.5 meters in size and 0.8 meters in height above the ground. For radiated EME measurements, the table used is to be capable of rotating 360 degrees and is to be equipped with AC outlets on the rotator surface. A remote control turntable is recommended for convenience and accuracy in testing.

Floor-standing devices do not require a test table. They are placed on the floor for line conducted EME testing or on the rotator for radiated EME testing.

3.5 Environmental Test Chamber

Measurements which require a stable ambient temperature are to be made in an environmental test chamber. The chamber is to be large enough to have the EUT placed totally inside the chamber. This applies to floor-standing and table-top EUTs. The chamber also must have controls which enable the temperature inside the chamber to be adjusted over the temperature range specified in the section of the FCC Rules under which the EUT is to be operated.

3.6 Variable-Voltage Transformer

Measurements which require variation of the AC power supply are to be made with a transformer which allows continuous variation of the supply voltage to the EUT from 85% to 115% of its rated voltage.

3.7 Signal Generator

A signal generator used to generate a stabilizing signal for a superregenerative receiver must be able to produce a maximum output of -20 dBm into 50 ohms. The frequency must be variable over the range of frequencies which the receiver is designed to receive.

3.8 Frequency Counter

A frequency counter used in performing measurements under this procedure must have a frequency accuracy of at least 1 part in 10^6.

3.9 Sampling Oscilloscope

A sampling oscilloscope used in performing measurements under this procedure must be capable of sweeping fast enough to accurately measure the shortest pulses generated by the transmitter. In addition, it must allow the length of the pulse train to be accurately measured.

3.10 Calibration

The measuring instruments, cables, antennas, and test facility are to be checked and calibrated as necessary on a regular basis to ensure the accuracy of the test results. Antenna cables are to be checked for changes in losses resulting from handling, frequent connection and disconnection, and exposure to the elements.

Antennas used in testing for radiated EME are to be calibrated for their free-space antenna factor to show traceability to the standard dipole antenna of the National Institute of Standards and Technology (formerly the National Bureau of Standards). Since antenna factors indicated by manufacturers may not be accurate, each antenna used for radiated measurements should be calibrated.

The impedance and isolation of each line impedance stabilization network (LISN), sometimes termed an artificial mains network, used for measuring conducted EME should be checked at least once a year in accordance with the procedure described in the attached Appendix.

4 CONFIGURATION OF EQUIPMENT UNDER TEST

4.1 Minimum Configuration of Equipment Under Test

The EUT shall be configured in a manner representative of the equipment as typically used. A device marketed to be operated as a stand-alone device is to be tested by itself. Conversely, a device designed and marketed to be operated as part of a multi-unit system shall be tested with all the system components, accessories, connecting cables, etc. normally used with the device attached to it and operating, to the extent possible, in a manner that is representative of actual use.

4.2 EUT System Cables

A device with connecting ports is to be connected to each system component or support device by a connecting cable. Interconnecting cables are to be of the type and length recommended for use with the equipment as marketed or as otherwise specified by the manufacturer. If multiple lengths of cable may be used interchangeably with the equipment, the cables used are to be of the length that maximizes emissions. If the lengths of the cables to be used with the equipment are not established, cables one meter in length are to be used for testing. See Section 15.31(g) of the FCC Rules.

4.3 Use of System Components and Simulators

In cases where the EUT is part of a system of interfacing units, the following guidelines are to be used in configuring the EUT for testing:

1) If the EUT is designed to be used with specific support equipment or system components, it is to be tested with that equipment.

2) To the extent possible, the EUT and the support equipment or system components that form the test system for the EUT are to be equipment marketed by the EUT manufacturer. The specific support equipment used with the EUT in the test also is to be of a type typically used with the EUT in normal operation.

3) The support equipment or system components for the EUT are not to be modified in order to enable the EUT to achieve compliance unless the modified device(s) will be marketed with the EUT.

4) Equipment intended to be marketed as a system is to be tested as a system.

5) Because of the added degree of measurement uncertainty that is present when a simulator is employed in the testing process, use of such devices is to be avoided wherever possible. If the EUT is a large device, a simulator may be used in place of actual interfacing units when the logistic circumstances of the equipment installation or the measurement facility would make the use of actual interfacing units impractical. However, it is important that any simulator used properly represent the electrical characteristics, such as impedances and RF signals, of the device for which it is substituted. In addition, any electrical interaction between the EUT and the actual system component unit due to mechanical characteristics should be duplicated by the simulator.

SECTION II - CONDUCTED MEASUREMENTS

The test procedures described in this section are to be used to measure the conducted EME of periodic emitters and associated superregenerative receivers.

5 CONDUCTED EME MEASUREMENTS

A device designed to be connected to the AC power lines of a public utility is subject to a limit on the amount of EME coupled back into the power lines. A device that is exclusively battery operated with no provisions for operation while connected to the AC power lines is exempt from the line conducted emission limits and the measurements specified in this section. Line conducted EME measurements on all other periodic emitters are to be made in accordance with the following procedure:

5.1 Set-up

Step 1)

Place a hand-held or table-top EUT in the center of the table or platform specified in Section 3.4. If the EUT is part of a multi-component system, locate it in the center, along the back edge of the table, oriented in a position as typical of normal use as possible and prepare it for operation, i.e. connect any component support units with cabling as specified in Section 4.2. (see Figure 3). System component devices are to be located on top or to the sides of the EUT as appropriate for a typical operating configuration. Set the test table on an earth-grounded conducting surface as specified in Section 2.4 and position it 0.4 meters from one earth-grounded vertical conducting surface. The table is not be closer to any other earth-grounded surface than 0.8 meters (See Figure 2).

Place a floor-standing EUT on the insulating material which covers the ground plane described in Section 2.4. Position the EUT 0.8 meters from the LISN and any other earth grounded conducting surface.

Other arrangements are acceptable where the EUT is designed to be positioned for use in a manner other than that described above, e.g. where the EUT and one or more system components are normally operated while lying on their sides instead of their bottom. In such cases, the EUT is to be arranged on the test table or floor as it would be in typical usage.

Step 2)

Bundle interconnecting cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter lengths until the overall length of the cable is approximately one meter. Each such interconnecting cable is to be bundled individually.

Interconnecting cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are, or will be, marketed with the EUT. It is not necessary to bundle EUT system cables that are permanently coiled.

Step 3)

Line conducted EME measurements are to be made with the EUT connected to the public utility lines through a nominal, standardized impedance, which is to be provided through a LISN as described in Section 3.3. Connect the LISN to the utility lines through an RF filter and electrically bond both the LISN and the filter to the ground plane. The EUT power cord is to be connected directly to the LISN for these measurements even if the EUT normally receives power through another device in the system. Connect the EUT power cord to the appropriate port on the LISN and connect the LISN to the filter on the AC utility power source. Terminate unused RF ports on the LISNs into 50 ohms.

If the EUT is not provided with a power cord, the unit is to be connected to the LISN by a power cord of the type specified by the manufacturer. This power cord is to be no longer than 2.0 meters. If a non-flexible power cord is provided with the EUT, it is to be cut to the length necessary to attach the EUT to the LISN.

Step 4)

If the EUT is tested on a table or test platform, drape the AC power cord of the EUT over the rear edge of the table and allow it to hang down vertically to the top of the LISN. Wrap excess power cord in a figure "8" pattern around 2 non-metallic pegs that are 9 centimeters high, approximately 2 centimeters in diameter, spaced 10 centimeters on center apart and attached to the top of the LISN (See Figure 2).

If the EUT is tested on the floor, route the AC power cord directly to the LISN and bundle the excess AC power cord in a serpentine fashion in the center, using 30 to 40 centimeter lengths.

If the EUT is provided with a permanently coiled power cord, bundling of the cord is not required.

Step 5)

System components or support devices used to complete the EUT system are to be powered through a second LISN. This equipment is to be powered through a second LISN even where the EUT is provided with AC outlets for supplying power to system components. AC power for all LISNs is to be obtained from the same filtered source. Connect any system components and support equipment associated with the EUT to a second LISN. Additional LISNs may be used, if necessary, to supply power to system components, provided that the number of additional LISNs used is kept to a minimum. Supply lines to the LISNs are to be of the lengths specified in Figure 2 and must be shielded. Terminate unused RF ports on the LISN(s) into 50 ohms.

Step 6)

If the EUT is part of a multi-component system tested on a test platform, drape AC power cords of system components or support equipment onto the insulating material that covers the ground plane. Do not wrap these power cords in a figure 8 pattern atop any LISN or bundle them in a serpentine fashion. No power cords from system components or support equipment are to be draped over the top of a LISN.

If the EUT is part of a multi-component system tested on the floor, the power cords of the system components or support equipment are to lie on the insulating material which covers the ground plane in any convenient manner.

Step 7)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation

conditions, the ground lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to the ground plane.

Step 8)

Connect the measuring instrument to a section of the LISN supplying power to the EUT using a suitable length of coaxial cable. The input to the measuring instrument is to be transferred in the testing to LISN sections connected to other current carrying conductors of the EUT to measure the line conducted emissions on those conductors. Any unused ports must be terminated into 50 ohms.

Step 9)

Record the arrangement of the equipment on the test table or floor. This is to include a diagram indicating the positions of the individual units of equipment and their interconnecting cables, the distances between adjacent units and the distances to the edge of the table or wall. Photographs clearly showing the position of the equipment may be used in lieu of, or addition to a diagram.

5.2 Testing for Conducted Emissions

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

A transmitter which normally operates for a short interval is to be made to transmit continuously for testing. Any switches on the EUT are to be set to the position which yields the maximum duty cycle. See Section 2.2, 7.6, 8.3 for the procedure to measure the duty cycle.

A superregenerative receiver is to be stabilized by transmitting an unmodulated carrier initially on the receiver frequency from an antenna in the proximity of the EUT. The amplitude and frequency of the signal shall be varied as necessary to obtain the highest level of emissions from the receiver. However, care must be taken not to overload the receiver. If the receiver is tested with a resistive termination instead of an antenna, a stabilizing signal of approximately -60 dBm is to be applied to the antenna terminals using a signal generator through an appropriate impedance matching network. Record the frequency and amplitude of the stabilizing signal.

Step 2)

Set the 6 dB bandwidth of the measuring instrument to not less than 9 kHz for conducted EME tests and the detector function to the CISPR quasi-peak mode.

Note: It may be desirable to make preliminary measurements with a spectrum analyzer to speed up the testing, since more than one emission at a time can be observed with an analyzer.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure the conducted EME of the EUT. Measurements are to be made by tuning the measuring instrument in a continuous manner over the range 0.45 MHz to 30 MHz.

Each emission is to be maximized by varying the position of the interconnecting cables. The following modes of operation are to be examined for every EUT:

a) The EUT in the powered up standby mode.

b) The EUT operating in a typical fashion.

c) The EUT sending/receiving a typical signal, if applicable.

Maximize each emission individually by rearranging the interconnecting cables. Record the 6 highest emission levels on each conductor of the EUT in the range 0.45 to 30 MHz. Also record the positions of the EUT system cables associated with those observations. Photograph or sketch the positions of the cables associated with the highest emissions level. If any of the maximum emission levels exceed the FCC limits, the device must be redesigned before the equipment can comply with the FCC technical requirements.

The FCC line conducted emissions limits for receivers (unintentional radiators) and transmitters (intentional radiators) are provided in Section 15.107(a)-(e) and Section 15.207(a)-(c) of the FCC Rules respectively (See Appendix 2).

Step 5)

Record the measurements in accordance with the data recording/reporting requirements specified in Section 8.

Step 6)

Transfer the input to the measuring instrument to the section of the LISN connected to the next current carrying conductor of the EUT to be measured. Repeat Steps 4 and 5 until emissions are measured from each current carrying conductor of the EUT.

6 ANTENNA POWER CONDUCTION MEASUREMENTS (RECEIVERS ONLY)

If a receiver is tested for radiated EME with a terminating resistor rather than an antenna connected to the antenna input terminals, antenna power conduction measurements are to be run in accordance with the procedure below. Power on the receive antenna terminals of a superregenerative receiver is to be determined by measuring the voltage present at the antenna terminal. Antenna power conduction measurements are not required for a receiver with a permanently attached antenna or for a receiver which is tested for radiated EME with an antenna attached to the receiver antenna terminals. See Section 15.111 of the FCC Rules for a further explanation of this requirement.

6.1 Set-up

Step 1)

The EUT is to be tested for antenna conducted power while set up in the same manner used for line conducted measurements in Section 5.1.

Step 2)
Disconnect the coaxial cable connecting the measurement instrument to the LISN. Terminate all ports on the LISNs into 50 ohms.

Step 3)
Disconnect the receive antenna from the EUT. Connect the measurement instrument to the antenna input terminals of the EUT. Use a direct connection only if the impedances are matched. Otherwise, use a balun or impedance matching network to connect the measuring instrument to the antenna input terminal(s).

Step 4)
Apply a stabilizing signal of approximately -60 dBm initially on the receiver frequency through the impedance matching network. The amplitude and frequency are to be varied to obtain the highest level of antenna conducted emissions.

Step 5)
Determine the range of the RF spectrum to be searched for radiated EME from the EUT in accordance with the provisions of Section 15.33 of the FCC Rules.

6.2 Testing for Antenna Conducted Power

Step 1)
Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)
Determine the frequency range of measurements from Section 15.33(b) of the FCC Rules (See Appendix 2).

Step 3)
Set the 6 dB bandwidth of the measuring instrument to 120 kHz +/- 20 kHz and the detector function of the unit to the quasi-peak mode in preparation for measuring emissions in the range 30 to 1000 MHz.

Step 4)
Calibrate the measuring instrument.

Step 5)
While maintaining the specified bandwidth and detector function, tune the measuring instrument through the frequency range being examined, up to 1000 MHz.

Step 6)
Record the most significant voltages present at the antenna terminals and their frequencies. If any of these voltages exceed the FCC limits, the device must be redesigned before the equipment can comply with the FCC technical rules. As provided in Section 15.111 Rules, the limit is 2.0 nanowatts.

Note: A voltage of 316 microvolts into 50 ohms is a power level of 2.0 nanowatts.

Step 7)
If the EUT is to be tested for antenna conducted power above 1000 MHz, change the bandwidth of the measuring instrument to 1 MHz and the detector function to the peak mode. Repeat the procedure in Steps 5 and 6 above to measure emissions over the frequency range of interest.

If all of the measured emissions comply with the average limit of 2.0 nanowatts, proceed to Step 9. If any emissions exceed the peak limit, which is 20 dB above the average limit of 2.0 nanowatts, the device must be redesigned before it can comply with the FCC technical rules.

Step 8)
Set the bandwidth of the measuring instrument narrow enough to allow the spectral components to be resolved, and set the detector function to the peak mode. Remeasure only those emissions found in Step 7 which complied with the peak limits, but exceeded the average limits when measured with a peak detector.

If any of these emission levels exceed the average limit of 2.0 nanowatts, the device must be redesigned before it can comply with the FCC technical rules.

Step 9)
Record the data in accordance with the data recording/reporting requirements specified in Section 8.

SECTION III - RADIATED MEASUREMENTS

The test procedures described in this section are to be used to measure the radiated EME of periodic emitters and associated superregenerative receivers.

7 RADIATED EME MEASUREMENTS

A periodic transmitter may be subject to occupied bandwidth limitations and limitations on the radiated field strength of the fundamental signal and spurious emissions. In addition, some transmitters are subject to a frequency stability requirement. Superregenerative receivers are subject to the same EME limits as other unintentional radiators in Section 15.109 of the FCC Rules. Measurements of radiated EME on periodic transmitters, associated superregenerative receivers and any supporting equipment are to be made in accordance with the following procedure.

7.1 Preliminary Testing

It is often useful to perform preliminary radiated EME tests at a distance closer than that specified in the applicable standards to determine the EME characteristics of the EUT. At nearer distances, it is sometimes easier to determine the spectrum signature of the EUT and the positions of cables that produce the maximum level of emissions. A site other than an open field site or equivalent facility may be used for this purpose. However, the test engineer should be aware that alternate sites may not produce results that correlate with results obtained at the required site. During preliminary testing, the EUT should be set-up in the same arrangement and operated in the same manner that will be employed in the actual radiated tests. A spectrum analyzer and broadband antennas are often useful for this type of testing. If a radio noise meter is used in preliminary testing, it is recommended that either headphones or a loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of

significant emissions from the EUT. Care must be taken not to miss any significant EME from the EUT during the preliminary tests.

7.2 General Radiated EME Set-up Instructions

Step 1)

Place a hand-held or table-top EUT on the non-conducting table or platform specified for radiated tests in Section 3.4. Locate the table on a test site meeting the conditions for radiated tests specified in Section 2.1.

Place a floor standing EUT on a rotator or other non-conducting surface.

Step 2)

Arrange the EUT on the table or floor in a position as typical of normal use as possible and prepare it for operation, i.e. connect any component support units with cabling as specified in Section 4.2. If the EUT is an individual hand-held or table-top unit, it is to be located in the center of the test platform. If the EUT is a multi-component system, the components are to be positioned in accordance with the instructions in Step 1 of Section 5.1 and Figure 3.

Step 3)

Bundle EUT system cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter loops until the cable length is approximately one meter. Each such EUT system cable is to be bundled individually. EUT system cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless they are marketed with the EUT. Cables that are permanently coiled are not required to be bundled.

Step 4)

Connect the EUT and its support equipment to the AC outlets on the rotator surface. The EUT power cord is to be connected directly to an AC outlet on the rotator for these measurements even if the EUT normally receives power through another device in the system. Allow excess power cord lengths to hang down vertically over the rear edge of the table and lie unbundled on the rotator surface.

Step 5)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground connector of a three prong plug is to be connected to ground at the AC outlet on the rotator.

Step 6)

Determine the range of the RF spectrum to be searched for radiated EME from the EUT in accordance with the provisions of Section 15.33 of the FCC Rules.

Step 7)

Set up the measuring receiver or spectrum analyzer and the proper antenna as specified in Section 3.2 for measuring emissions in the range 30 to 1000 MHz, with connection of the antenna to the receiver through an appropriate length of coaxial cable. Locate the antenna at a distance of 3 meters from the EUT. This distance is measured as the horizontal distance from: 1) the nearest point on the measurement antenna when that antenna is oriented to receive emissions from that device; to 2) the nearest point on the EUT, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system over a complete rotation of the turntable.

Step 8)

If the EUT is a transmitter which normally operates for a short interval, set it to transmit continuously for testing. Set any switches on the transmitter to the position which yields the maximum duty cycle.

If the EUT is a superregenerative receiver, stabilize it by transmitting an unmodulated carrier on the receiver frequency from an antenna in the proximity of the EUT. Vary the amplitude and frequency of the signal as necessary to obtain the highest level of radiated emissions from the receiver. However, care must be taken not to overload the receiver. If the receiver is tested with a resistive termination instead of an antenna, apply a stabilizing signal of approximately -60 dBm to the antenna terminals from a signal generator below the test platform through an appropriate impedance matching network.

7.3 Testing for Radiated Emissions

Step 1)

The frequency range over which to measure radiated EME from the EUT is the same range determined in Step 2 of Section 6.2.

Step 2)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 3)

Prepare to measure emissions in the frequency range 30 - 1000 MHz. Pursuant to Section 15.231(b)(2) of the FCC Rules, measurements on a periodic transmitter may be made using a quasi-peak detector, or by calculating the average value over one duty cycle. Pursuant to Section 15.109 of the FCC Rules, measurements on a superregenerative receiver are to be made using a quasi-peak detector.

If quasi-peak measurements are to be made on either a periodic transmitter or superregenerative receiver, set the 6 dB bandwidth of the measuring instrument to at least 100 kHz and the detector function of that unit to the CISPR quasi-peak mode. If average measurements are to be made on a periodic transmitter, set the 6 dB bandwidth of the spectrum analyzer to at least 100 kHz and the detector function to the peak mode. The bandwidth should be increased, if necessary to determine the true maximum level of the signal.

Step 4)

Calibrate the measuring instrument.

Step 5)

Measure radiated EME over the range 30 - 1000 MHz. Search for emissions by tuning the measurement instrument in a continuous manner over this range. While performing the measurements it may be necessary to change bandwidths on the measuring instrument as the area of spectrum examined changes. The bandwidth must not be set at less than 100 kHz.

Each emission is to be maximized by varying the position of the interconnecting cables. The following modes of operation are to be examined for every EUT:

a) The EUT in the powered up standby mode.

b) The EUT operating in a typical fashion.

c) The EUT receiving a typical signal, if applicable.

Maximize each emission by rearranging the interconnecting cables of the EUT, rotating the test table though 360 degrees, raising and lowering the antenna from 1 to 4 meters, aligning the orientation of the antenna to the EUT and again rearranging the interconnecting cables, again rotating the test table 360 degrees until each individual emission is maximized. Repeat this process for the other polarity of the measurement antenna i.e. horizontal first, then vertical.

A hand held or body worn EUT shall be tested in three mutually orthogonal planes on the turntable, i.e., on its back, standing on one end, and on its side.

When average measurements are made on a periodic transmitter, the average is determined by multiplying the maximum level of the emission (in microvolts per meter) by the correction for the duty cycle (between 0 and 1). Alternatively, the duty cycle correction can be converted to dB and subtracted from the maximum value of the emission (in dB referenced to one microvolt per meter). See Section 7.6 for the procedure to measure the transmitter duty cycle.

Record the maximum emission levels observed with the antenna in the horizontal and vertical positions in each of the frequency ranges 30 - 88 MHz, 88 - 216 MHz, 216 - 1000 MHz. If any of these maximum levels exceed the FCC limits, the device must be redesigned or modified before the equipment can comply with the FCC technical rules.

The field strength limits for a periodic transmitter are specified in the rule section under which the transmitter is designed to operate. The FCC Rules specifying field strength limits for periodic transmitters are presented in Appendix 2.

The field strength limits for superregenerative receivers are specified in Section 15.109 of the FCC Rules. This rule section is presented in Appendix 2.

For a receiver which employs terminals for the connection of an external receiving antenna, the receiver shall be tested to demonstrate compliance with the provisions of this section with an antenna connected to the antenna terminals unless the antenna conducted power is measured as specified in Section 15.111(a) of the FCC Rules. If compliance is demonstrated with the antenna conducted power limit in Section 15.111(a) of the FCC Rules, the radiated emission tests shall be performed with the antenna terminals shielded and terminated with a resistive termination equal to the impedance specified or employed for the antenna. If a permanently attached receiving antenna is used, the receiver shall be tested to demonstrate compliance with the provisions of this Section with the antenna attached.

If the highest frequency to be examined for radiated EME from the EUT is less than or equal to 1000 MHz, proceed to step 9.

Step 6)

Prepare to measure emissions above 1000 MHz in the peak mode. Connect the antenna for measuring emissions above 1000 MHz to the measuring instrument and set it up at the proper distance from the EUT as specified in Step 7 of Section 7.2. Set the 6 dB bandwidth of the measuring instrument to at least 1 MHz, and the detector function to the peak mode.

Step 7)

Measure emissions in the peak mode above 1000 MHz up to the maximum measurement frequency for the EUT using the measurement scheme described in Step 5 above. Record the maximum emission levels observed with the antenna in the horizontal and vertical positions for the frequency ranges 1000 - 2000 MHz, 2000 - 5000 MHz, and 5000 MHz up to the highest frequency examined. Photograph or sketch the test set-up and EUT system cable arrangement for the highest level of emissions observed in each of the frequency intervals examined. In order for the device to be considered compliant, it must meet both the average limit specified in the rules, and the peak limit, which is 20 dB above the average limit.

Step 8)

Determine the average levels of those emissions measured above which exceeded the average limits but complied with the peak limits (when measured in the peak mode). If the EUT is a periodic transmitter for which average measurements were made below 1000 MHz, calculate the average level by applying a correction factor for the duty cycle as in Step 5, above. If the EUT is a periodic transmitter for which quasi-peak measurements were made below 1000 MHz, set the 6 dB bandwidth of the measuring receiver to at least 1 MHz, and detector function to the average mode. If the EUT is a superregenerative receiver, select a 6 dB bandwidth which will allow the spectral components to be resolved, and set the detector function to the peak mode. Again using the appropriate antenna and measurement scheme described in Step 5, remeasure only those emissions which complied with the peak limits but exceeded the average limits. Record the most significant emission levels observed with the antenna in the horizontal and vertical positions for each particular emission.

If any of these emission levels exceed the average limits, the device must be redesigned or modified before it can comply with the FCC technical rules.

Step 9)

Record the data in accordance with the data recording/reporting requirements specified in Section 8.

7.4 Testing for Transmitter Bandwidth

The FCC Rules specify the bandwidth limits for periodic transmitters. Under Section 15.231(c) of these rules, the maximum permitted bandwidth (20 dB down from the modulated carrier) is 0.25% of the center frequency for periodic transmitters operating between 70 and 900 MHz, and 0.5% of the center frequency for such transmitters operating above 900 MHz. Section 15.231(d) of the rules provides that the bandwidth of devices operating in the 40.66 to 40.70 MHz band is to be confined within the band edges. Compliance with these standards is determined in the following manner.

Step 1)

Turn on the transmitter and allow sufficient time for the unit to warm up to normal operating conditions.

Step 2)

Set the unit to transmit a modulated carrier.

Step 3)

Set the resolution bandwidth of the spectrum analyzer to no greater than 10 percent of the maximum permitted bandwidth of the transmitter.

Step 4)

Tune the spectrum analyzer to the transmitter carrier frequency.

Step 5)

Rotate the turntable to find the maximum emission. It may be necessary to move the receiving antenna closer than 3 meters from the transmitter.

Step 6)

Measure the frequencies of the points on the envelope 20 dB below the level of the modulated carrier. These -20 dB points determine the bandwidth of the signal. A maximum hold or long persistence display should be used to clearly observe the components.

Step 7)

Record the measured bandwidth in accordance with the recording/reporting requirements specified in Section 8.

7.5 Transmitter Frequency Stability Measurements

The FCC Rules specify frequency stability requirements for periodic transmitters. Pursuant to Section 15.231(d) of these rules, the carrier frequency of a periodic transmitter operating in the band of 40.66 to 40.70 MHz shall not vary more than +/- 0.01% over the temperature range of -20 to +50 degrees C. In addition, that frequency tolerance is to be maintained for a variation in the supply voltage from 85% to 115% of the rated supply voltage at a temperature of +20 degrees C.

Note: The voltage variation only applies to equipment operated from an AC power line. Battery powered equipment is to be tested with a new battery.

Step 1)

Turn on the transmitter and allow sufficient time for the unit to warm up to normal operating conditions.

Step 2)

Set the unit to transmit only an unmodulated carrier.

Step 3)

Place the transmitter in the environmental test chamber which will allow adjustment of the temperature over the range of -20 to +50 degrees C.

Step 4)

For devices that operate from the AC power lines, connect the transmitter to a variable-voltage transformer that will allow variation of the supply voltage from 85% to 115% of the rated supply voltage. Adjust the voltage initially to 100%.

Step 5)

Attach a frequency counter to the antenna terminal using appropriate connectors and attenuators. If a frequency counter can not be directly connected, use an antenna connected to the counter to receive a signal.

Step 6)

Adjust the temperature in the chamber to +20 degrees C and allow sufficient time for the transmitter to reach that temperature.

Step 7)

Activate the transmitter and record the frequency indicated on the counter. The carrier frequency at +20 degrees C and 100% of the rated voltage is the reference for determining the frequency tolerance.

Step 8)

For devices that operate from the AC power lines, vary the supply voltage to 85%, 100% and 115% of the rated voltage. Measure and record the voltage and frequency in each case.

Step 9)

Increase the temperature in the chamber to +50 degrees C and allow sufficient time for the transmitter to reach that temperature. Activate the transmitter and record the and frequency indicated on the counter.

Step 10)

Reduce the temperature in the chamber in 10 degree increments until -20 degrees C is reached. At each new temperature, allow sufficient time for the transmitter to reach that temperature. Measure and record the temperature and frequency in each case.

Step 11)
If the frequency tolerance exceeds the specified limit, e.g., 0.01% from the reference found in step 7, the device must be redesigned or modified before it can comply with the Commission's technical requirements.

Step 12)
Record the data in accordance with the data recording/reporting requirements specified in Section 8.

7.6 Transmitter Duty Cycle Measurements
When average measurements are made for a pulse modulated transmitter, the average is to be found by measuring the peak level of the emissions and correcting for the duty cycle. A sampling oscilloscope is used to find the transmitter duty cycle.

Step 1)
Connect the oscilloscope to the video output of a spectrum analyzer which is used to demodulate and detect the pulse train.

Note: While the pulse train may be viewed using just a spectrum analyzer with a scan width of 0 (zero) Hz, the use of an oscilloscope facilitates viewing the pulses, and allows a more accurate measurement of their width.

Step 2)
Turn on the transmitter and allow sufficient time for the unit to warm up to normal operating conditions.

Step 3)
Set the transmitter to transmit the pulse train continuously. If the transmitter has any switches to change the coding of the pulses, they are to be set to the position which maximizes the duty cycle.

Step 4)
Tune the spectrum analyzer to the transmitter carrier frequency.

Step 5)
Set the spectrum analyzer resolution bandwidth wide enough to encompass all significant spectral components. The video bandwidth should be at least as wide as the resolution bandwidth.

Step 6)
Set the analyzer vertical scale (amplitude) to the linear mode.

Step 7)
Set the spectrum analyzer frequency scan to 0 (zero) Hz. If necessary, move the receiving antenna in closer than 3 meters from the device. It should now be possible to observe the pulse train.

Step 8)
Observe the signal on the oscilloscope. The oscilloscope settings are to be adjusted as necessary to view the pulse train and determine the number and widths of the pulses, as well as the period of the pulse train.

Step 9)
Measure the pulse widths. The pulse width is determined by measuring the time difference between the two half voltage points on a pulse.

Step 10)
When the pulse train is less than 100 milliseconds, including blanking intervals, the duty cycle is found by averaging the sum of the pulse widths over one complete pulse train. Alternatively, or when the pulse train exceeds 100 milliseconds, the duty cycle is found by averaging the sum of the pulse widths over the 100 millisecond window with the highest average value. The average value is the sum of the pulse widths in one period (or 100 ms), divided by the length of the period (or 100 ms). (These are the methods set forth in Section 15.231(b)(3)(i) of the FCC Rules).

Step 11)
Record the highest value of the duty cycle found in accordance with the data recording/reporting requirements in Section 8.

8 DATA REPORTING/RECORDING REQUIREMENTS

8.1 The Test Report
The test report for a periodic transmitter or superregenerative receiver is to contain the following information:

1) The location and identification of the test sites used for the line conducted and radiated measurements and whether these sites were laboratory facilities or on-site locations.

2) Identification and description, including input impedance, of the instrumentation and equipment used to perform the tests. This is to include identification of the type of antenna(s) used for measuring radiated emissions.

3) Specific identification, including the FCC ID's if applicable, of the EUT and, in the case of multicomponent systems, all equipment used in the system with the EUT.

4) Descriptions of the length and construction of each EUT system cable. The report is to indicate whether cables are shielded or unshielded, have plastic or metallic hoods, have ferrite beading, etc.

5) Photographs or diagrams of the positions of the equipment on the test table in both the conducted and radiated EME tests.

6) A description of any alternative methods used in the testing, in accordance with the specifications in Section 8.4.

7) The test results and associated comparative information presented in accordance with the specifications in Sections 8.2 and 8.3.

8) A description of any modifications made to the EUT or other system components during the testing.

9) Name of the party who performed the tests.

10) The date the tests were performed.

11) A statement signed by the individual responsible for the test that the EUT as tested complies or does not comply with the applicable FCC rules.

12) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Note: In the case of devices required to be certificated, refer also to Part 2 and Part 15 of the FCC rules for general information requirements pertaining to all applications for certification.

8.2 Recorded Measurements

The 6 highest emissions measured on each conductor of the EUT power cord in the line conducted EME tests are to be recorded in the test report. If antenna conducted power measurements are performed, the 6 highest emissions measured are to be recorded in the test report. In addition, the report is to include the diagrams of the interface cable positions and, for radiated emissions, the table and antenna positions associated with those emissions. The highest radiated EME measured with the antenna(s) in the horizontal and vertical planes in each of the frequency ranges specified in the FCC Rules (i.e. 30-88 MHz, 88-216 MHz, 216-960 MHz, 960-1000 MHz, 1000-2000 MHz, etc.) are to be recorded in the test report. The report is also to contain the measured transmitter bandwidth, including a photograph or plot of the spectrum. For a transmitter subject to a frequency stability requirement, the carrier frequency is to be reported every 10 degrees between -20 and +50 degrees centigrade, and at 85%, 100%, and 115% of the rated supply voltage at +20 degrees centigrade (AC equipment only). If average measurements are made on a periodic transmitter, the highest duty cycle and the coding switch positions which produced it are to be reported, and a plot of the pulse train is to be included.

The report is also to contain a photograph or diagram of both the radiated and line conducted EME measurement test set-ups clearly showing the EUT system configuration and the interconnecting cables.

The measurement results and the FCC limits the EUT, as appropriate, are to be presented in tabular form for comparison purposes. If a graphic presentation of the data is available, i.e. a plot from a spectrum analyzer, it should be incorporated into the test report also.

8.3 Units of Measurement

Measurements of line conducted EME and antenna conducted power are to be reported in units of microvolts or dB referenced to one microvolt (dBuV). Measurements of radiated EME are to be reported in units of microvolts per meter (uV/m) or dB referenced to 1 microvolt per meter (dBuV/m) at the distance specified in the FCC rules. Measurements of carrier frequency and transmitter bandwidth are to be provided in hertz or megahertz. Temperatures are to be reported in degrees centigrade. Duty cycle measurements are to be reported in percent.

The indicated readings on the measuring instrument are to be converted to microvolts, dBuV, uV/m or dBuV/m by use of appropriate conversion factors. These factors may include antenna factor, amplifier gain, balun loss, impedance transformation loss, etc. and must be given if they are part of the final recorded values. All formulas of conversions and conversion factors are to be included and explained in the measurement report. Radiated measurements above 30 MHz taken at alternative distances are to be converted to the equivalent at the limit distance using the inverse relationship of 20 dB/decade. See Section 15.31(f) of the rules for additional information on performing measurements at alternative distances.

8.4 Description of Alternate Methods and/or Conditions Used

If an alternate test method is used, the test report must identify and describe that method, provide justification for its use, and describe how the results obtained through its use correlate with the methods specified herein. Instrumentation, instrument attenuator and bandwidth settings, detector function, EUT arrangement, and all other pertinent details of the test are to be provided. Where automatic scan techniques are used, an explanation of how each emission from the EUT was maximized and the scan rate used to obtain each recorded emission is to be included in the test report.

REFERENCES

This standard includes the following publications to the extent they are applicable:

[1] FCC/OET Bulletin 55, "Characteristics of Open Field Test Sites".*

[2] International Special Committee on Radio Interference (CISPR) Publication 16 - CISPR specification on radio interference measuring apparatus and measurement methods, 1987, 2nd edition.

[3] American National Standard Specifications for Electromagnetic Interference and Field Strength Instrumentation 10 kHz to 40 GHz, ANSI C63.2 (1987).

[4] American National Standard Methods of Measurement of Electromagnetic Emissions from Low Voltage Electrical and Electronic Equipment in the Range of 10 kHz to 1 GHz, ANSI C63.4 (1981).

[5] Part 15 of FCC Rules and Regulations, 47 CFR Part 15.

* This document is available from the FCC Consumer Assistance and Small Business Division, 1919 M Street, N.W., Washington, D.C. 20554

FIGURES

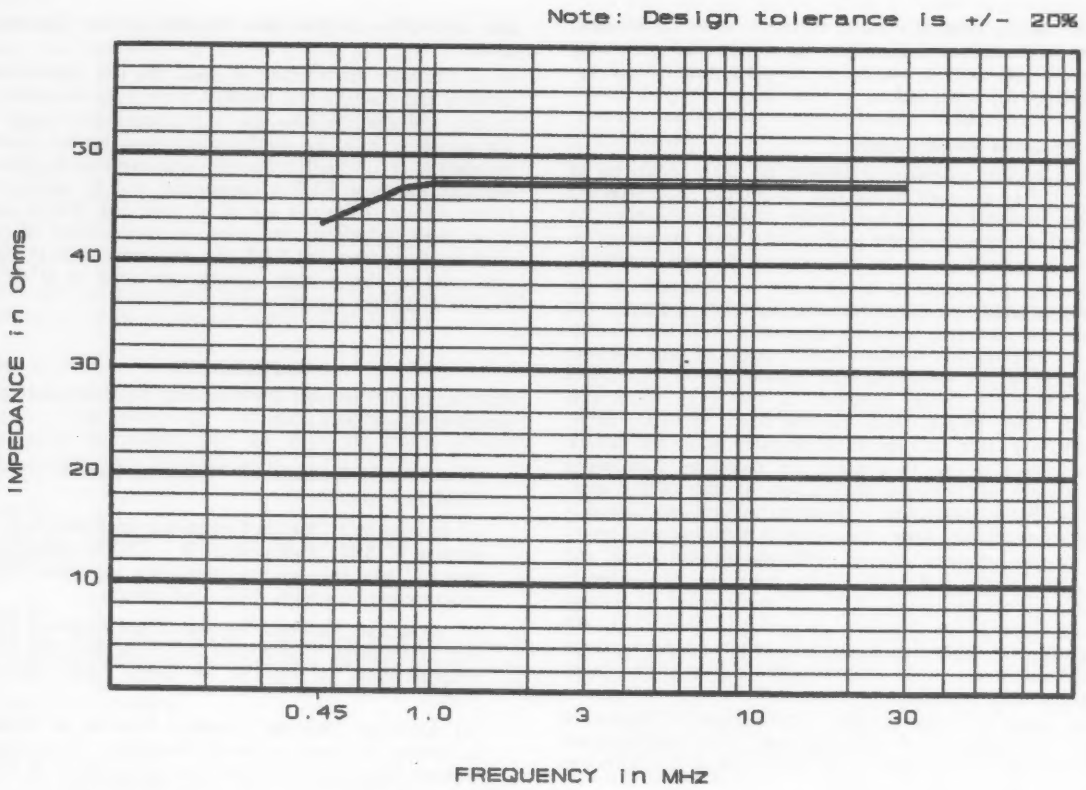

Figure 1 Characteristic impedance of 50 ohm / 50 uH LISN

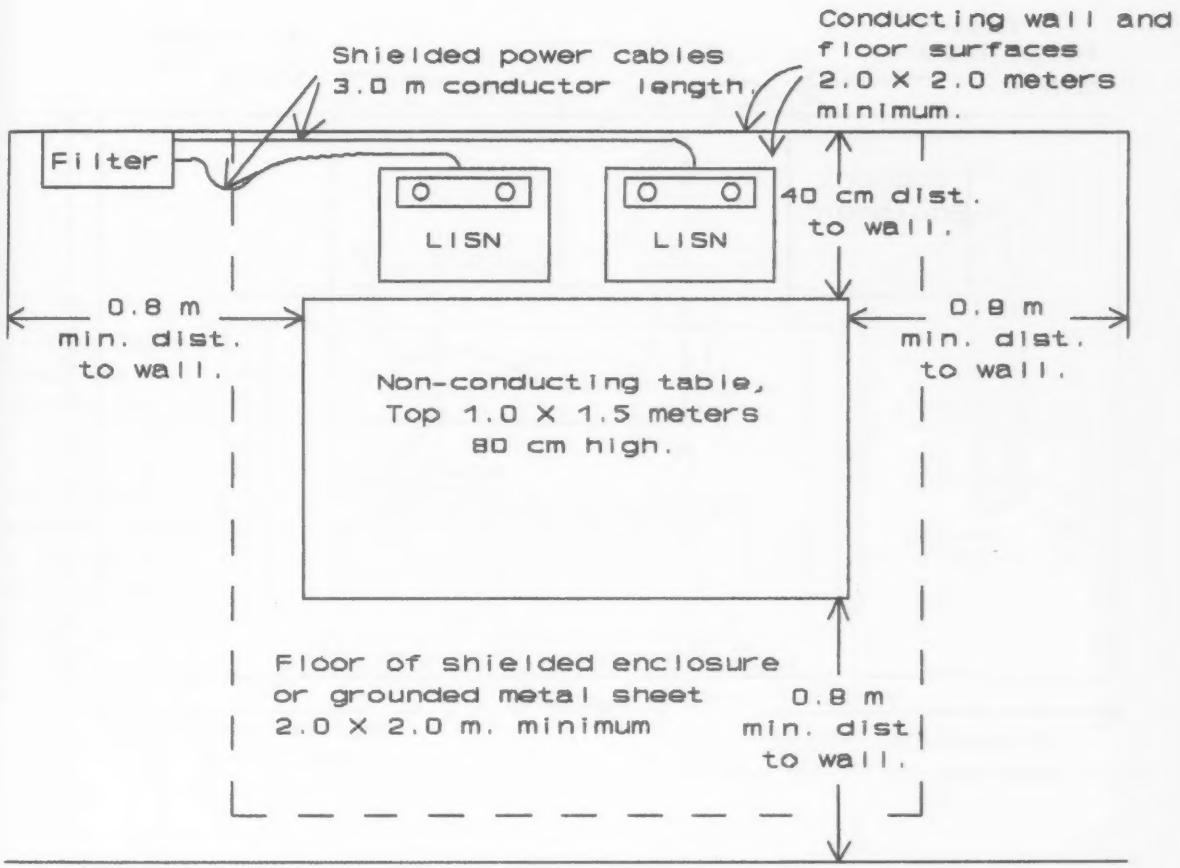

Figure 2 Line conducted test configuration for table-top equipment (top view).

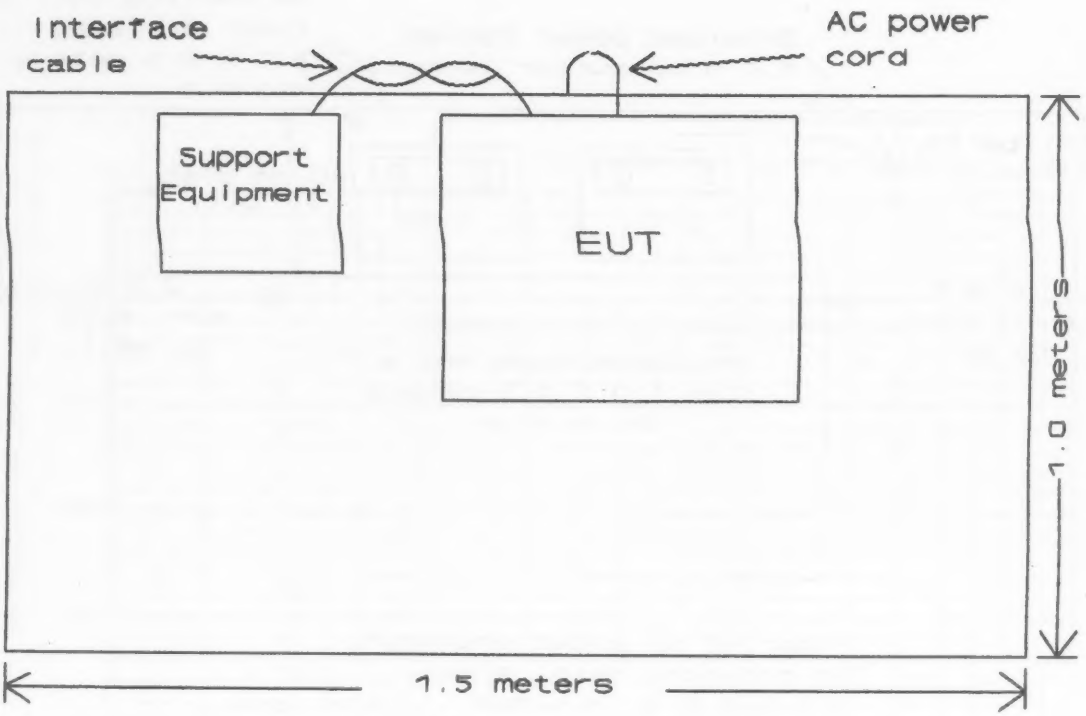

Figure 3 Test platform for testing table-top equipment (top view).

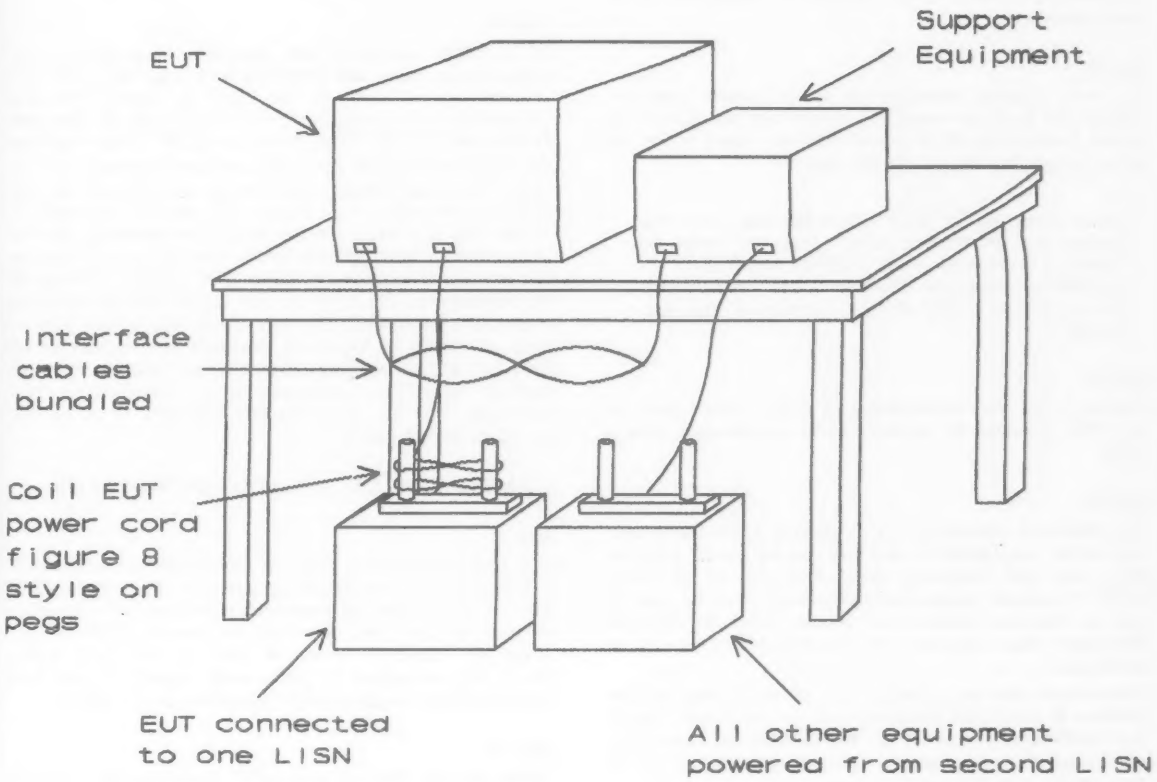
EUT
Support Equipment
Interface cables bundled
Coil EUT power cord figure 8 style on pegs
EUT connected to one LISN
All other equipment powered from second LISN

Figure 4 Line conducted testing of table-top equipment (side view).

APPENDIX 1 Procedure for Checking Line Impedance Stabilization Networks

The impedance and isolation of each Line Impedance Stabilization Network (LISN) section is to be measured at least once a year using the following procedures:

A.1 MEASURING THE IMPEDANCE OF A LISN

Step 1)

This measurement is to be made with the LISN installed for testing any device which requires line conducted EME measurements.

Step 2)

To avoid possible introduction of AC power from the supply line into the measuring instrument, disconnect the power connections (both neutral and hot lines) to the test set-up at the line side of the RF filter.

> Note: Since the RF filter will isolate the LISN from power line impedance effects that can cause the apparent impedance of the LISN to vary beyond the acceptable limits, the RF filter should remain connected to the LISN during impedance measurements.

Step 3)

Connect a 50 ohm termination to every coaxial port on the LISN provided for connection to a measuring instrument.

Step 4)

The preferred instrument for measuring LISN impedance is a vector impedance meter that can be tuned continuously over the frequency range 450 kHz to 30 MHz. Other impedance measuring instruments may be used as long as they are continuously tunable over the required frequency range, however, this procedure may have to be modified.

Instruments that are capable only of measuring the impedance at a selected frequency (i.e. an instrument that is not continuously tunable) are not suitable for these measurements since resonances can not be detected at all frequencies over the specified range.

Using an adapter with short connections such as that shown in Photo 1, connect the measuring instrument directly to one terminal of the AC outlet on the load side of the LISN normally used to supply power to the EUT or peripheral, and measure the impedance of that side of the LISN, tuning the instrument over the frequency range between 450 kHz and 30 MHz so as to detect any impedance variations that may be due to resonances or other imperfections.

Step 5)

Plot the measured impedance curve for comparison with the tolerances shown in Figure 1 of this test procedure. If any measured value exceeds the permissible error tolerance, the LISN must be modified to reduce the error to an acceptable level.

Step 6)

Repeat steps 4 and 5 with the measuring instrument connected to the other terminal of the AC outlet used to supply power to the EUT or peripheral on the LISN.

Step 7)

If the AC outlet used to supply power to the EUT has more than two current-carrying terminals on it, repeat steps 4 and 5 for each additional terminal.

Step 8)

If the LISN inductors have magnetic materials in their construction, make the following additional tests with AC current applied through the LISN to ensure that any variability due to effects of line current can be detected. Disconnect the RF filter from the LISN. Short together the load terminals of the LISN and feed current into the supply terminals from a low voltage transformer of suitable current rating (See Figure A). An AC ammeter in series with the circuit can be used to measure the applied current and a variable transformer can be used to regulate the amount of current by varying the primary voltage of the transformer. The high current circuit should not have a ground connection. Connect the measurement instrument as shown in Figure A. Measure the impedance of the LISN while supplying current at the LISN's maximum current rating. The impedance values measured by this technique will be approximately one-half of those observed in steps 5 and 6.

A.2 MEASURING THE ISOLATION BETWEEN LISNs

Step 1)

The isolation between the AC supply ports of the EUT LISN and the corresponding ports of the other LISNs used in line conducted measurements must be checked to ensure that the EME entering the second LISN do not affect the measured levels of EME at the EUT LISN. Begin this procedure by performing steps 1, 2, and 3 of the impedance measurement procedure in A.1 above.

Step 2)

Leave the RF filter of each LISN disconnected from AC power at the line side of the filter.

Step 3)

Connect a signal generator to one AC supply port of the LISN used to supply current to the EUT.

Step 4)

Connect the measuring equipment to the corresponding AC supply port on the second LISN using an adaptor similar to that shown in Photo 1.

Step 5)

Measure the isolation attenuation over the range 450 kHz to 30 MHz. The isolation so measured should be 40 dB or greater.

Step 6)
Repeat Steps 4 and 5 for the corresponding AC supply ports on all LISNs used in line conducted measurements at the test facility.

Step 7)
Repeat Steps 3, 4, 5, and 6 for the remaining AC supply ports on the EUT LISN.

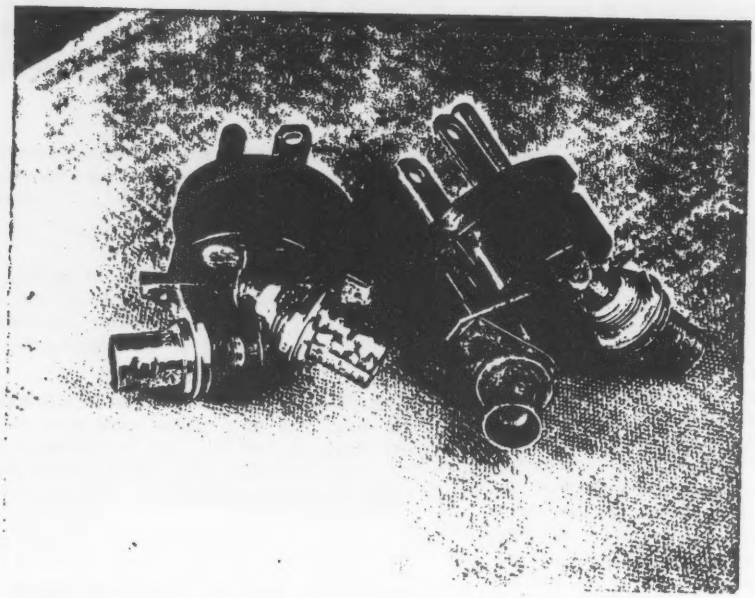

Photo 1

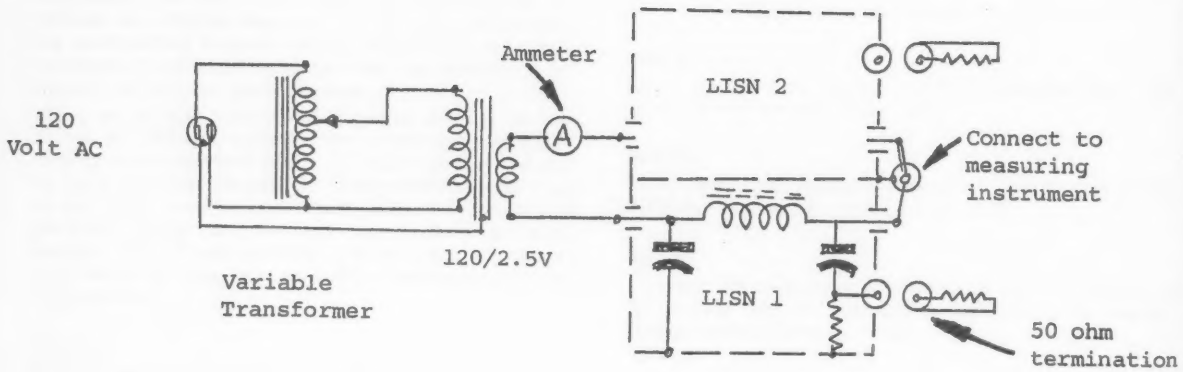

Figure A

APPENDIX 2 Extract of rules contained in Part 15 as adopted in the First Report and Order in General Docket 87-389.

Section 15.31 Measurement standards.

(f) To the extent practicable, the device under test shall be measured at the distance specified in the appropriate rule section. The distance specified corresponds to the horizontal distance between the measurement antenna and the closest point of the equipment under test, support equipment or interconnecting cables as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the system containing the equipment under test. The equipment under test, support equipment and any interconnecting cables shall be included within this boundary.

(1) At frequencies equal to or above 30 MHz, measurements may be performed at a distance closer than that specified provided this does not result in measurements taken in the near field. When performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance using an inverse linear distance extrapolation factor (20 dB/decade). Measurement at a distance greater than specified is not permitted unless the responsible party can demonstrate that measurements at the specified distance are impractical because of the size of the equipment, the location of the equipment, or other factors, or unless the responsible party can demonstrate that such a measurement would take place in the near field, as could occur when performing measurements on some large digital devices and perimeter protection systems. Measurements shall not be performed at a distance greater than 30 meters unless it can be demonstrated that measurement at a distance of 30 meters or less is impracticable and, further, that the signal level needed to be determined at the distance employed can be detected by the measuring equipment. When performing measurements at a distance greater than that specified, the results shall be interpolated to the specified distance using an inverse linear distance interpolation factor (20 dB/decade).

(2) At frequencies below 30 MHz, measurements may be performed at a distance closer than that specified in the regulations; however, an attempt should be made to avoid making measurements in the near field. Pending the development of an appropriate measurement procedure for measurements performed below 30 MHz, when performing measurements at a closer distance than specified, the results shall be extrapolated to the specified distance by either making measurements at a minimum of two distances on at least one radial to determine the proper extrapolation factor or by using the square of an inverse linear distance extrapolation factor (40 dB/decade).

(3) The applicant for a grant of certification shall specify the interpolation or extrapolation method used in the application filed with the Commission. For equipment subject to notification or verification, this information shall be retained with the measurement data.

(4) When measurement distances of 30 meters or less are specified in the regulations, the Commission will test the equipment at the distance specified unless measurement at that distance results in measurements being performed in the near field. When measurement distances of greater than 30meters are specified in the regulations, the Commission will test the equipment at a closer distance, usually 30 meters, extrapolating the measured field strength to the specified distance using the methods shown in this Section.

(5) Measurements shall be performed at a sufficient number of radials around the equipment under test to determine the radial at which the field strength values of the radiated emissions are maximized. The maximum field strength at the frequency being measured shall be reported in an application for certification.

(g) Equipment under test shall be adjusted, using those controls that are readily accessible to or are intended to be accessible to the consumer, in such a manner as to maximize the level of the emissions. For those devices to which wire leads may be attached by the consumer, tests shall be performed with wire leads attached. The wire leads shall be of the length to be used with the equipment if that length is known. Otherwise, wire leads one meter in length shall be attached to the equipment. Longer wire leads may be employed if necessary to interconnect to associated peripherals.

(m) Measurements on intentional radiators or receivers, other than TV broadcast receivers, shall be performed and, if required, reported for each band in which the device can be operated with the device operating at the number of frequencies in each band specified in the following table:

Frequency range over which device operates	Number of frequencies	Location in the range of operation
1 MHz or less	1	Middle
1 to 10 MHz	2	1 near top and 1 near bottom
More than 10 MHz	3	1 near top, 1 near middle and 1 near bottom

Section 15.33 Frequency range of radiated measurements.

(a) For an intentional radiator, the spectrum shall be investigated from the lowest radio frequency signal generated in the device, without going below 9 kHz, up to at least the tenth harmonic of the highest fundamental frequency or to 40 GHz, whichever is lower. If the intentional radiator contains a digital device, regardless of whether this digital device controls the functions of the intentional radiator or the digital device is used for additional control or function purposes other than to enable the operation of the intentional radiator, the frequency range shall be investigated up to the higher of the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator or the upper frequency of the measurement range applicable to the digital device, as shown in paragraph (b)(1) of this Section.

(b) For unintentional radiators:

(1) Except as otherwise indicated in paragraphs (b)(2) or (b)(3), for an unintentional radiator, including a digital device, the spectrum shall be investigated from the lowest radio frequency signal generated or used in the device, without going below the lowest frequency for which a radiated emission limit is specified, up to the frequency shown in the following table:

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 108	1000
108 - 500	2000
500 - 1000	5000
Above 1000	5th harmonic of the highest frequency or 40 GHz maximum, whichever is lower

(2) A unintentional radiator, excluding a digital device, in which the highest frequency generated in the device, the highest frequency used in the device and the highest frequency on which the device operates or tunes are less than 30 MHz and which, in accordance with Section 15.109, is required to comply with standards on the level of radiated emissions within the frequency range 9 kHz to 30 MHz, such as a CB receiver or a device designed to conduct its radio frequency emissions via connecting wires or cables, e.g., a carrier current system not intended to radiate, shall be investigated from the lowest radio frequency generated or used in the device, without going below 9 kHz (25 MHz for CB receivers), up to the frequency shown in the following table. If the unintentional radiator contains a digital device, the upper frequency to be investigated shall be that shown in the table below or in the table in paragraph (b)(1) above, as based on both the highest frequency generated and the highest frequency used in the digital device, whichever range is higher.

Highest frequency generated or used in the device or on which the device operates or tunes (MHz)	Upper frequency of measurement range (MHz)
Below 1.705	30
1.705 - 10	400
10 - 30	500

(3) Except for a CB receiver, a receiver employing superheterodyne techniques shall be investigated from 30 MHz up to at least the second harmonic of the highest local oscillator frequency generated in the device. If such receiver is controlled by a digital device, the frequency range shall be investigated up to the higher of the second harmonic of the highest local oscillator frequency generated in the device or the upper frequency of the measurement range specified for the digital device in paragraph (b)(1) of this Section.

(c) The above specified frequency ranges of measurements apply to the measurement of radiated emissions and, in the case of receivers, the measurement to demonstrate compliance with the antenna conduction limits specified in Section 15.111. The frequency range of measurements for AC power line conducted limits is specified in Sections 15.107 and 15.207 and applies to all equipment subject to those regulations. In some cases, depending on the frequency(ies) .generated and used by the equipment, only signals conducted onto the AC power lines are required to be measured.

(d) Particular attention should be paid to harmonics and subharmonics of the fundamental frequency as well as to those frequencies removed from the fundamental by multiples of the oscillator frequency. Radiation at the frequencies of multiplier stages should also be checked.

Section 15.35 Emission limits.

The conducted and radiated emission limits shown in this Part are based on the following, unless otherwise specified elsewhere in this Part:

(a) On any frequency or frequencies below or equal to 1000 MHz, the limits shown are based on measuring equipment employing a CISPR quasi-peak detector function and related measurement bandwidths, unless otherwise specified. The specifications for the measuring instrument using the CISPR quasi-peak detector can be found in Publication 16 of the International Special Committee on Radio Interference (CISPR) of the International Electrotechnical Commission. As an alternative to CISPR quasi-peak measurements, the responsible party, at its option, may demonstrate compliance with the emission limits using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, as long as the same bandwidths as indicated for CISPR quasi-peak measurements are employed.

Note: For pulse modulated devices with a pulse-repetition frequency of 20 Hz or less and for which CISPR quasi-peak measurements are specified, compliance with the regulations shall be demonstrated using measuring equipment employing a peak detector function, properly adjusted for such factors as pulse desensitization, using the same measurement bandwidths that are indicated for CISPR quasi-peak measurements.

(b) On any frequency or frequencies above 1000 MHz, the radiated limits shown are based on the use of measurement instrumentation employing an average detector function. When average radiated emission measurements are specified in the regulations, including emission measurements below 1000 MHz, there is also a limit on the radio frequency emissions, as measured using instrumentation with a peak detector function, corresponding to 20 dB above the maximum permitted average limit for the frequency being investigated. Measurements of AC power line conducted emissions are performed using a CISPR quasi-peak detector, even for devices for which average radiated emission measurements are specified.

(c) When the radiated emission limits are expressed in terms of the average value of the emission, and pulsed operation is employed, the measured field strength shall be determined by averaging over one complete pulse train, including blanking intervals, as long as the pulse train does not exceed 0.1 seconds. As an alternative (provided the transmitter operates for longer than 0.1 seconds) or in those cases where the pulse train exceeds 0.1 seconds, the measured field strength shall be determined from the average absolute voltage during a 0.1 second interval during which the field strength is at its maximum value. The exact method of calculating the average field strength shall be submitted with any application for certification or shall be retained in the measurement data file for equipment subject to notification or verification.

Section 15.37 Transition provisions for compliance with the rules

Equipment may be authorized, manufactured and imported under the Rules in effect prior to (insert date 60 days after date of publication in the Federal Register) in accordance with the following schedules:

(a) For all intentional and unintentional radiators, except for receivers: Radio frequency equipment verified by the responsible party or for which an application for a grant of equipment authorization is submitted to the Commission on or after (insert date 3 years after effective date of the R&O) shall comply with the regulations specified in this Part. Radio frequency equipment that is manufactured or imported on or after (insert date 5 years after effective date of the R&O) shall comply with the regulations specified in this Part.

(b) For receivers: Receivers subject to the regulations in this Part that are manufactured or imported on or after (insert date 10 years after effective date of the R&O) shall comply with the regulations specified in this Part. However, if a receiver is associated with a transmitter that could not have been authorized under the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register), e.g., a transmitter operating under the provisions of Sections 15.209 or 15.249 (below 960 MHz), the transition provisions in this Section do not apply. Such receivers must comply with the regulations in this Part.

(c) There are no restrictions on the operation or marketing of equipment complying with the regulations in effect prior to (insert date 60 days after date of publication in the Federal Register).

Section 15.107 Conducted limits.

(a) Except for Class A digital devices, for equipment that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) For a Class A digital device that is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed the limits in the following table. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals. The lower limit applies at the band edges.

Frequency of Emission (MHz)	Conducted Limit (microvolts)
0.45 - 1.705	1000
1.705- 30.0	3000

(c) For carrier current systems used as unintentional radiators whose emissions are contained within the frequency range 450 kHz to 30 MHz, the provisions of this Section shall not apply. Such systems are subject to radiated emission limits as provided in Section 15.109(e).

(d) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.109 Radiated emission limits.

(a) Except for Class A digital devices, the field strength of radiated emissions from unintentional radiators at a distance of 3 meters shall not exceed the following values:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	100
88 - 216	150
216 - 960	200
Above 960	500

(b) The field strength of radiated emissions from a Class A digital device, as determined at a distance of 10 meters, shall not exceed the following:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	90
88 - 216	150
216 - 960	210
Above 960	300

(c) In the emission tables above, the tighter limit applies at the band edges. Sections 15.33 and 15.35 which specify the frequency range over which radiated emissions are to be measured and the detector functions and other measurement standards apply.

(d) For CB receivers, the field strength of radiated emissions within the frequency range of 25 - 30 MHz shall not exceed 40 microvolts/meter at a distance of 3 meters. The field strength of radiated emissions above 30 MHz from such devices shall comply with the limits in paragraph (a).

(e) Carrier current systems used as unintentional radiators or other unintentional radiators that are designed to conduct their radio frequency emissions via connecting wires or cables and that operate in the frequency range of 9 kHz to 30 MHz, including devices that deliver the radio frequency energy to transducers, such as ultrasonic devices not covered under Part 18 of this Chapter, shall comply with the radiated emission limits for intentional radiators provided in Section 15.209 for the frequency range of 9 kHz to 30 MHz. At frequencies above 30 MHz, the provisions of paragraph (a) of this Section apply.

(f) For a receiver which employs terminals for the connection of an external receiving antenna, the receiver shall be tested to demonstrate compliance with the provisions of this Section with an antenna connected to the antenna terminals unless the antenna conducted power is measured as specified in Section 15.111(a). If a perma-

nently attached receiving antenna is used, the receiver shall be tested to demonstrate compliance with the provisions of this Section.

Section 15.205 Restricted bands of operation.

(a) Except as shown in paragraph (d), only spurious emissions are permitted in any of the frequency bands listed below:

MHz	MHz	MHz	GHz
0.090 - 0.110	162.0125 - 167.17	2310 - 2390	9.3 - 9.5
0.49 - 0.51	167.72 - 173.2	2483.5 - 2500	10.6 - 12.7
2.1735 - 2.1905	240 - 285	2655 - 2900	13.25 - 13.4
8.362 - 8.366	322 - 335.4	3260 - 3267	14.47 - 14.5
13.36 - 13.41	399.9 - 410	3332 - 3339	15.35 - 16.2
25.5 - 25.67	608 - 614	3345.8 - 3358	17.7 - 21.4
37.5 - 38.25	960 - 1240	3600 - 4400	22.01 - 23.12
73 - 75.4	1300 - 1427	4500 - 5250	23.6 - 24.0
108 - 121.94	1435 - 1626.5	5350 - 5460	31.2 - 31.8
123 - 138	1660 - 1710	7250 - 7750	36.43 - 36.5
149.9 - 150.05	1718.8 - 1722.2	8025 - 8500	Above 38.6
156.7 - 156.9	2200 - 2300	9000 - 9200	

(b) Except as provided in paragraph (d), the field strength of emissions appearing within these frequency bands shall not exceed the limits shown in Section 15.209. At frequencies equal to or less than 1000 MHz, compliance with the limits in Section 15.209 shall be demonstrated using measurement instrumentation employing a CISPR quasi-peak detector. Above 1000 MHz, compliance with the emission limits in Section 15.209 shall be demonstrated based on the average value of the measured emissions. The provisions in Section 15.35 apply to these measurements.

(c) Except as provided in paragraph (d), regardless of the field strength limits specified elsewhere in this Subpart, the provisions of this Section apply to emissions from any intentional radiator.

(d) The following devices are exempt from the requirements of this Section:

(1) Swept frequency field disturbance sensors operating between 1.705 and 37 MHz provided their emissions only sweep through the bands listed in paragraph (a), the sweep is never stopped with the fundamental emission within the bands listed in paragraph (a), and the fundamental emission is outside of the bands listed in paragraph (a) more than 99% of the time the device is actively transmitting, without compensation for duty cycle.

(2) Transmitters used to detect buried electronic markers at 101.4 kHz which are employed by telephone companies.

(3) Cable locating equipment operated pursuant to Section 15.213.

Section 15.207 Conducted limits.

(a) For an intentional radiator which is designed to be connected to the public utility (AC) power line, the radio frequency voltage that is conducted back onto the AC power line on any frequency or frequencies within the band 450 kHz to 30 MHz shall not exceed 250 microvolts. Compliance with this provision shall be based on the measurement of the radio frequency voltage between each power line and ground at the power terminals.

(b) The limit in paragraph (a) shall not apply to intentional radiators operated as carrier current systems in the frequency range of 450 kHz to 30 MHz. Such systems are subject to radiated emission limits as provided in Sections 15.205 and 15.209.

(c) Measurements to demonstrate compliance with the conducted limits are not required for devices which only employ battery power for operation and which do not operate from the AC power lines or contain provisions for operation while connected to the AC power lines. Devices that include, or make provision for, the use of battery chargers which permit operating while charging, AC adaptors or battery eliminators or that connect to the AC power lines indirectly, obtaining their power through another device which is connected to the AC power lines, shall be tested to demonstrate compliance with the conducted limits.

Section 15.209 Radiated emission limits, general requirements.

(a) Except as provided elsewhere in this Subpart, the emissions from an intentional radiator shall not exceed the field strength levels specified in the following table:

Frequency (MHz)	Field Strength (microvolts/meter)	Measurement Distance (meters)
0.009 - 0.490	2400/F(kHz)	300
0.490 - 1.705	24000/F(kHz)	30
1.705 - 30.0	30	30
30 - 88	100 **	3
88 - 216	150 **	3
216 - 960	200 **	3
Above 960	500	3

** Except as provided in paragraph (g), fundamental emissions from intentional radiators operating under this Section shall not be located in the frequency bands 54-72 MHz, 76-88 MHz, 174-216 MHz or 470-806 MHz.

(b) In the emission table above, the tighter limit applies at the band edges.

(c) The level of any unwanted emissions from an intentional radiator operating under these general provisions shall not exceed the level of the fundamental emission. For intentional radiators which operate under the provisions of other Sections within this Part and which are required to reduce their unwanted emissions to the limits specified in this table, the limits in this table are based on the frequency of the unwanted emission and not the fundamental frequency. However, the level of any unwanted emissions shall not exceed the level of the fundamental frequency.

(d) The emission limits shown in the above table are based on measurements employing a CISPR quasi-peak detector except for the frequency bands 9-90 kHz, 110-490 kHz and above 1000 MHz. Radiated emission limits in these three bands are based on measurements employing an average detector.

(e) The provisions in Sections 15.31, 15.33, and 15.35 for measuring emissions at distances other than the distances specified in the above table, determining the frequency range over which radiated emissions are to be measured, and limiting peak emissions apply to all devices operated under this Part.

(f) In accordance with Section 15.33(a), in some cases the emissions from an intentional radiator must be measured to beyond the tenth harmonic of the highest fundamental

frequency designed to be emitted by the intentional radiator because of the incorporation of a digital device. If measurements above the tenth harmonic are so required, the radiated emissions above the tenth harmonic shall comply with the general radiated emission limits applicable to the incorporated digital device, as shown in Section 15.109 and as based on the frequency of the emission being measured, or, except for emissions contained in the restricted frequency bands shown in Section 15.205, the limit on spurious emissions specified for the intentional radiator, whichever is the higher limit. Emissions which must be measured above the tenth harmonic of the highest fundamental frequency designed to be emitted by the intentional radiator and which fall within the restricted bands shall comply with the general radiated emission limits in Section 15.109 that are applicable to the incorporated digital device.

(g) Perimeter protection systems operating under the provisions of this Section in the frequency bands allocated to TV broadcast stations, as shown in Part 73 of this Chapter, shall contain their fundamental emissions within the frequency bands 54-72 MHz and 76-88 MHz. Further, the use of such perimeter protection systems is limited to industrial, business and commercial applications.

Section 15.231 Periodic operation in the band 40.66 - 40.70 MHz and above 70 MHz.

(a) The provisions of this Section are restricted to periodic operation within the band 40.66 - 40.70 MHz and above 70 MHz. Except as shown in paragraph (e) of this Section, the intentional radiator is restricted to the transmission of a control signal such as those used with alarm systems, door openers, remote switches, etc. Radio control of toys is not permitted. Continuous transmissions, such as voice or video, and data transmissions are not permitted. The prohibition against data transmissions does not preclude the use of recognition codes. Those codes are used to identify the sensor that is activated or to identify the particular component as being part of the system. The following conditions shall be met to comply with the provisions for this periodic operation:

(1) A manually operated transmitter shall employ a switch that will automatically deactivate the transmitter within not more than 5 seconds of being released.

(2) A transmitter activated automatically shall cease transmission within 5 seconds after activation.

(3) Periodic transmissions at regular predetermined intervals are not permitted. However, polling or supervision transmissions to determine system integrity of transmitters used in security or safety applications are allowed if the periodic rate of transmission does not exceed one transmission of not more than one second duration per hour for each transmitter.

(4) Intentional radiators which are employed for radio control purposes during emergencies involving fire, security, and safety of life, when activated to signal an alarm, may operate during the pendency of the alarm condition.

(b) In addition to the provisions of Section 15.205, the field strength of emissions from intentional radiators operated under this Section shall not exceed the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emissions (microvolts/meter)
40.66 - 40.70	2,250	225
70 - 130	1,250	125
130 - 174	1,250 to 3,750 **	125 to 375 **
174 - 260	3,750	375
260 - 470	3,750 to 12,500 **	375 to 1,250 **
Above 470	12,500	1,250

** linear interpolations

(1) The above field strength limits are specified at a distance of 3 meters. The tighter limits apply at the band edges.

(2) Intentional radiators operating under the provisions of this Section shall demonstrate compliance with the limits on the field strength of emissions, as shown in the above table, based on the average value of the measured emissions. As an alternative, compliance with the limits in the above table may be based on the use of measurement instrumentation with a CISPR quasi-peak detector. The specific method of measurement employed shall be specified in the application for equipment authorization. If average emission measurements are employed, the provisions in Section 15.35 for averaging pulsed emissions and for limiting peak emissions apply. Further, compliance with the provisions of Section 15.205 shall be demonstrated using measurement instrumentation with a CISPR quasi-peak detector.

(3) The limits on the field strength of the spurious emissions in the above table are based on the fundamental frequency of the intentional radiator. Spurious emissions shall be attenuated to the average limits shown in this table or to the general limits shown in Section 15.209, as measured with a CISPR quasi-peak detector, whichever limit permits a higher field strength.

(c) The bandwidth of the emission shall be no wider than 0.25% of the center frequency for devices operating above 70 MHz and below 900 MHz. For devices operating above 900 MHz, the emission shall be no wider than 0.5% of the center frequency. Bandwidth is determined at the points 20 dB down from the modulated carrier.

(d) For devices operating within the frequency band 40.66-40.70 MHz, the bandwidth of the emission shall be confined within the band edges and the frequency tolerance of the carrier shall be + 0.01%. This frequency tolerance shall be maintained for a temperature variation of -20 degrees to +50 degrees C at normal supply voltage, and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage at a temperature of 20 degrees C. For battery operated equipment, the equipment tests shall be performed using a new battery.

(e) Intentional radiators may operate at a periodic rate exceeding that specified in paragraph (a) and may be employed for any type of operation, including operation prohibited in paragraph (a), provided the intentional radiator complies with the provisions of paragraphs (b) through (d) of this Section, except the field strength table in paragraph (b) is replaced by the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (microvolts/meter)	Field Strength of Spurious Emission (microvolts/meter)
40.66 - 40.70	1,000	100
70 - 130	500	50
130 - 174	500 to 1,500 **	50 to 150 **
174 - 260	1,500	150
260 - 470	1,500 to 5,000 **	150 to 500 **
Above 470	5,000	500

** linear interpolations

In addition, devices operated under the provisions of this paragraph shall be provided with a means for automatically limiting operation so that the duration of each transmission shall not be greater than one second and the silent period between transmissions shall be at least 30 times the duration of the transmission but in no case less than 10 seconds.

FOOTNOTES

[1] *See Report and Order* in GEN. Docket No. 87-389, adopted March 30, 1989, FCC-103. We plan to initiate separate rule making proceedings to establish measurement procedures for other types of devices as part of our plan for implementing the Part 15 rules.

[2] Part 15 of the Commission's rules permits the operation of non-licensed radio frequency (RF) devices under standards designed to ensure that such devices do not cause interference to authorized radio services. Non-licensed RF devices are permitted to operate subject to the condition that they comply with the Part 15 technical standards and cause no interference to authorized radio services. Such devices receive no protection from interference caused by other RF equipment. *See* 47 CFR Section 15.5. Under Part 15, intentional radiators are devices that intentionally generate and emit RF energy by radiation or induction. *See* 47 CFR Section 15.3(o).

[3] Under Part 15, unintentional radiators are devices that intentionally generate RF energy for use within the device, or that send RF signals by conduction to associated equipment via connecting wiring, but that are not intended to emit RF energy by radiation or induction. *See* 47 CRF Section 15.3(aa).

[4] *OST Bulletin MP-1,* "FCC Methods of Measurement for Determining Compliance of Control and Security Alarm Devices and Associated Receivers"

[5] *See Report and Order* in GEN. Docket No. 87-389, adopted March 30, 1989, FCC 89-103.

[6] We will continue to employ the existing measurement procedures for periodic emitters, except spread spectrum, and associated receivers pending the adoption of the new TP-6.

[7] *See Report and Order* in GEN. Docket No. 87-389, *supra,* at paras. 91-95.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-294

In re Application of

CHRISTIAN FM APPLICATION PARTNERSHIP — File No. BPH-870313OA

For a Construction Permit for a New FM Broadcast Station on Channel 274 at Marion, Kentucky

HEARING DESIGNATION ORDER

Adopted: June 13, 1989; Released: June 27, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application of Christian FM Application Partnership ("Christian FM") for a construction permit for a new FM station on Channel 274A at Marion, Kentucky.

2. *Unresolved Issues*. Information before the Commission indicates that Christian FM was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	MM Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise is a real party in interest in the subject applicant; whether or not the applicant's organizational structure is a sham; and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues call into question Christian FM's qualifications to be a Commission licensee. Therefore, such issues will be specified against Christian FM in this proceeding.

3. *Conflicting Information*. Christian FM's application indicates that it is a general partnership consisting of 24 individuals. However, in an amendment filed on January 13, 1989, with respect to other ownership interests by members of the partnership, reference is made that: "William R. Allen, III, and Alfred R. Patton are general partners of the sole limited partner of Christian FM Application Partnership." Accordingly, Christian FM will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which clarifies this statement. In the event it is determined that Christian FM has failed to properly notify the Commission of a change in its organizational structure, the presiding Administrative Law Judge will specify an appropriate issue.

4. *Addresses of Principals*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Christian FM has not completed Item 4 correctly. Christian FM's application provides a post office box number as the residence address for Jack M. Tyler, Jr., Charles Stacy Maxwell, and Davis L. Cosey. Accordingly, Christian FM must submit an amendment which gives all the information required by Section II Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Late - Filed Amendments*. Christian FM petitioned for leave to amend its application on September 30, 1988; November 15, 1988; December 21, 1988; and January 13, 1989. The accompanying amendments were filed after April 20, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed real party-in-interest to the application of Christian FM Application Partnership.

2. To determine whether Christian FM Application Partnership's organizational structure is a sham.

3. To determine, based on the evidence adduced pursuant to issues 1 and 2 above, whether Christian FM Application Partnership possesses the basic qualifications to be a Commission licensee.

7. IT IS FURTHER ORDERED, That, Christian FM shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment providing the information requested in paragraph 3, above. In the event that the information supplied indicates that Christian FM has failed to apprise the Commission of a change in its organizational structure, the presiding Administrative Law Judge shall specify an appropriate issue.

8. IT IS FURTHER ORDERED, That Christian FM shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment which contains the information required by Section II, Item 4 of FCC Form 301, as discussed in paragraph 4, above.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend referenced in paragraph 5, above, ARE ACCEPTED for Section 1.65 purposes.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, Christian FM shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That Christian FM shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-293

In re Applications of

MARGARET ESCRIVA (hereafter "Escriva") — File No. BPH-871124MG

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "American Indian") — File No. BPH-871124MM

PLAINS FM LIMITED PARTNERSHIP (hereafter "Plains") — File No. BPH-871124MP

SPACECOM, INC. (hereafter "SpaceCom") — File No. BPH-871124MW

For a Construction Permit
for a New FM Station
on Channel 223A (92.5 MHz)
in Topeka, Kansas

HEARING DESIGNATION ORDER

Adopted: June 13, 1989; Released: June 27, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* Escriva has filed a timely petition to deny American Indian's application. In her petition, Escriva asserts that at the time American Indian filed the instant application for new FM service to Topeka, it had pending 12 other applications for new FM service.[1] Escriva further states that 47 C.F.R. § 73.3555(d)(1)(ii) prohibits ownership of more than twelve stations in the same service which are not minority-controlled. Thus, Escriva argues, American Indian violated the Commission's rule against filing inconsistent applications, 47 C.F.R. § 73.3518, at the time that it filed its thirteenth application, the instant application for Topeka, because the Commission regards the multiple ownership rules set out at 47 C.F.R. § 73.3555 as establishing the maximum number of applications that are grantable. As a consequence, Escriva asserts that American Indian's application for new FM service to Topeka should have been returned as unacceptable for filing. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 101 FCC 2d 638, 648-49 (1985). In its opposition to the petition to deny, American Indian responds that it is a minority-controlled applicant entitled to own a cognizable interest in up to fourteen applications for new FM stations pursuant to 47 C.F.R. § 73.3555(d)(1)(i). American Indian has submitted the affidavit of Jack W. Bursack, President, Director, and 33 1/3% shareholder, which states that 66 2/3% ownership of American Indian is controlled by individuals who qualify as American Indians, and thus is a minority-controlled entity as defined by Commission rules.

3. A violation of the inconsistent application rule, 47 C.F.R. § 73.3518, occurs *at the time of filing* of the application in question. Thus, if American Indian is not a minority-controlled entity, its filing of the instant application without an appropriate waiver request of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, would thus mandate subsequent return of the application as unacceptable for filing pursuant to 47 C.F.R. § 73.3518. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3492 (1987). However, Escriva's petition to deny, American Indian's response to the petition, and Escriva's reply have raised questions of fact concerning American Indian's status as a minority-controlled entity.[2] Accordingly, appropriate issues concerning American Indian's compliance with the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, and the inconsistent application rule, 47 C.F.R. § 73.3518, will be specified below, and Escriva's petition to deny will be granted to the extent indicated herein.

4. *Plains.* Information before the Commission indicates that Plains was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Plains' qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

5. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast

application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Plains has responded to Item 5(e) in the negative. However, Commission records indicate that R.L. Groat, Velma O. Randle, and Robert F. Robare are limited partners in the Sedona, Arizona proceeding. Additionally, R.L. Groat is a limited partner in the Swanton, Ohio proceeding. However, Plains has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

6. *Other matters.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Escriva	April 5, 1988; April 18, 1988 July 5, 1988 (Engineering); October 12, 1988
American Indian	April 28, 1988; July 11, 1988; October 27, 1988; February 17, 1989
Plains	May 17, 1989
SpaceCom	March 4, 1988; July 26, 1988; August 5, 1988; September 19, 1988; October 4, 1988; November 29, 1988; January 30, 1989; March 13, 1989; April 20, 1989

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Plains and American Indian would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether American Indian's filing of the instant application constitutes a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555; and

(b) if so, whether the filing of American Indian's application constitutes a violation of the Commission's inconsistent application rule, 47 C.F.R. § 73.3518 which, if so, would warrant dismissal of the application.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Plains.

3. To determine whether Plains' organizational structure is a sham.

4. To determine whether Plains violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

5. To determine, from the evidence adduced pursuant to Issues 2 through 4 above, whether Plains possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Plains and American Indian would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 2 hereinabove, the petition to deny filed by Escriva IS GRANTED to the extent indicated above and IS DENIED in all other respects.

11. IT IS FURTHER ORDERED, That Escriva's motion to strike American Indian's response to Escriva's petition to deny IS DENIED.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Escriva, American Indian, Plains and Spacecom ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] These applications are as follows: File No. BPH-870820MB, Hartford, Michigan; File No. BPH-870820MC, Alamogordo, New Mexico; File No. BPH-870820MD, Shreveport, Louisiana; File No. BPH-870824, Panama City, Florida; File No. BPH-870827NF, Post, Texas; File No. BPH-870827, Lawton, Oklahoma; File No. BPH-870827MQ, Atlantic City, New Jersey; File No. BPH-870908MQ, Germantown, Tennessee; File No. BPH-870914MC, DeWitt, Michigan; File No. BPH-870916MB, State College, Pennsylvania; File No. BPH-870921MB, San Angelo, Texas; and File No. BPH-870928MC, Windsor, Virginia.

[2] Additionally, we note that Escriva has filed a motion to strike American Indian's response to the petition as untimely filed. While American Indian's response was filed after the time allowed for oppositions had expired, *see* 47 C.F.R. §§ 1.45, 1.4(g), we note that the Commission's multiple ownership rule is ambiguous, in that it does not state if or at what point an applicant is required to disclose or document its status as a qualifying minority. Given the fact that the application in question, on its face, suggests that the applicant may be a qualified minority-controlled entity, the Commission, pursuant to 47 C.F.R. § 73.3514(b), could have required American Indian to respond to Escriva's petition. Therefore, for administrative convenience, we will deny Escriva's motion to strike and consider American Indian's response even though it was not timely filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-291

In re Applications of

MIDLAND EDUCATIONAL BROADCASTING FOUNDATION (hereafter: Midland) — File No. BPED-831121AI

RADIO MINISTRIES (hereafter: Radio) — File No. BPED-840731IG

For Construction Permit for a New Noncommercial Educational FM Station on Channel 211A in Midland, Texas

HEARING DESIGNATION ORDER

Adopted: June 13, 1989; Released: June 27, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.[1]

2. *Preliminary Matters*. On June 6, 1988, a Petition to Deny Radio's application was filed by E.L. Gamble ("Gamble"), a resident of the proposed community of license. Gamble alleges that: (1) Moody Broadcasting is an "undisclosed real party-in-interest" in Radio's application as evidenced by the statement of Mr. John Steele, a principal of the applicant, in the presence of others, "that the Applicant intends to totally turn the station over to Moody Broadcasting upon completion of construction to commence operations"; and (2) Radio has misrepresented that it has "reasonable assurance . . . of the availability of its transmitter site" as evidenced by a letter from the owner of the Wilco Building stating that Radio has no "agreement" to lease office or antenna space in or on the roof of the building.

3. The Court of Appeals for the District of Columbia Circuit, in a recent line of cases here controlling, clarified and reaffirmed the Commission's statutorily prescribed two-step process for judging the sufficiency of a petition to deny.[2] Consequently, it is well established that in order to obtain an evidentiary hearing, the proponent of a petition to deny must first set forth specific allegations of fact sufficient to show that "a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2). If not, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

4. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone; the Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). In the instant case, the petitioner alleges the apparent existence of real party-in-interest and site availability violations. After consideration of the petitioner's allegations, as required under 47 U.S.C. § 309(d)(1), we are persuaded that the assumed violations, standing alone, are sufficient to establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Banks Broadcasting Co.*, 50 Fed. Reg. 16,138 (1985); *Kist Corp.*, 99 FCC 2d 173 (1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Julie P. Minor (KDXU)*, 51 FCC 2d 1163 (Rev. Bd. 1975); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987).

5. Having found that the petition comports with the requirements set forth in 47 U.S.C. § 309(d)(1), *i.e.*, to plead specific facts which, if assumed true, show that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity, we now reach the question of the substantiality or materiality of the facts presented.

6. First, the test for determining whether a third person is a real party-in-interest is "whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station." *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The unsubstantiated evidence upon which Gamble bases his allegation, *i.e.*, the hearsay statement that Mr. John Steele, one of the applicant's principals, said that "the station will be turned over to Moody Broadcasting upon completion of construction to commence operations," is not sufficient to establish the existence of a real party-in-interest violation in light of Radio's rebuttal in its Opposition to Petition to Deny, filed July 6, 1988.[3] In its Opposition, Radio: (1) states that it clearly disclosed in Section IV, Item 5 of FCC Form 340 (January 1983) that it will be affiliated with Moody Broadcasting Network; and (2) offers the declaration of Mr. John Steele (attached as Exhibit C), the President of Radio, that Radio "has no intention of transferring the proposed Midland, Texas construction permit to The Moody Bible Institute of Chicago, Inc. [but rather] . . . intends to broadcast the programming of the Moody Bible Network, a program service offered by the Moody Bible Institute . . . ." Thus, Gamble has not established the existence of a real party-in-interest violation.

7. Second, Gamble's allegation, supported by a letter it submitted from the owner of the Wilco Building, that Radio does not have reasonable assurance of site availability because it has no "agreement" with the Wilco Build-

ing to lease office or antenna space, is insufficient to establish a violation of the site availability requirement. An applicant need not have a binding agreement or absolute assurance to demonstrate reasonable assurance of the availability of its proposed transmitter site. *See Alden Communications Corp.*, 102 FCC 2d 518, 519 (Rev. Bd. 1985), *recon. denied*, 103 FCC 2d 1 (1986). Reasonable assurance may be acquired in numerous ways, including entering into a formal option to lease the land. *Id.* In the instant case, Radio offers evidence that it paid $100.00 to the Wilco Building's leasing agent, Wilkinson Realty Co., for a lease option on the roof of the Wilco Building (a copy of the check is attached as Radio's Exhibit D). Thus, Gamble's allegation that Radio has not demonstrated reasonable assurance of site availability is without merit.

8. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Gamble's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petition to deny filed by Gamble will be denied.

9. On January 5, 1988, Radio and Midland filed a Joint Request for Approval of Settlement Agreement. Under the terms of this agreement, Midland Educational Broadcasting Foundation ("Midland") would dismiss its application in exchange for being provided a total of four hours of programming each week on Radio's broadcast station during the following time slots: Sunday - 11:00 a.m. to 12:00 noon; 7:00 p.m. to 8:00 p.m.; Monday through Saturday - two hours of programming between 7:00 a.m. and 10:00 p.m., to be in 15-minute, 30-minute, or one-hour segments selected by mutual agreement of the parties. Midland would be solely responsible for the production and submission of the programming materials to be aired at the times delineated above, and would be required to submit the appropriate programming by 12:00 noon on the Saturday preceding the scheduled Sunday program slots, and at least 24 hours prior to any other program slot to be aired Monday through Saturday.

10. We believe that this arrangement calls into question the acceptability of the settlement agreement as it seems to violate the Commission's "long-standing policy that responsibility for selecting program material lies with the licensee. 'That responsibility "can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments." *Report on Editorializing*, 13 FCC 2d [1246,] 1248.'" *Cosmopolitan Broadcasting Corp.*, 59 FCC 2d 558, 561 (1976), *recon. denied*, 61 FCC 2d 257 (1976), *quoting Fairness Report*, 48 FCC 2d 1, 10 (1974), *reconsidered*, 58 FCC 2d 691 (1976). "Even with time brokerage contracts, '[i]t is, of course, the licensee's obligation to retain control over programming content at all times.'" *Cosmopolitan Broadcasting* at 561, *quoting United Broadcasting Co. of New York*, 4 RR 2d 167, 173 (1965). *See also Welcome Radio, Inc.*, 2 FCC 2d 582 (1969). Accordingly, the joint request for approval of the settlement agreement will be denied, Midland's application will not be dismissed, and both applications will be designated for comparative hearing. It should be noted that this action is not intended to preclude the applicants, either before commencement of the hearing or at any time during the course of the hearing, from participating in negotiations to reach a settlement agreement acceptable to both the parties and to the Commission.

11. *Share - time Arrangement.* An issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

12. *Areas and Populations.* Neither applicant has provided us with the area and population of its proposed service area. Since there may be a significant difference in the size of the areas and populations which would receive service from the proposals, each applicant will be required to submit this information within 30 days of the release of this Order. Upon receipt of this information, the presiding Administrative Law Judge will determine whether or not an appropriate issue should be specified. If so, since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

13. *Air Hazard.* Midland has received clearance from the Federal Aviation Administration (FAA) to mount its antenna at a tower height of 112 feet above ground level (AGL). However, Midland proposes to mount its antenna at a tower height of 120 feet AGL. Accordingly, Midland will be required to file an amendment specifying the FAA-approved tower height of 112 feet AGL with the presiding Administrative Law Judge within 30 days of the release of this Order. Additionally, Midland will be required to notify the FAA of its intention to construct its proposed lower tower within 30 days of the release of this Order. A copy of both the amendment and the notification to the FAA shall be filed with the Chief, Audio Services Division. Further, since the FAA has determined that the antenna proposed by Midland constitutes a hazard to air navigation, an issue with respect thereto will be specified below and the FAA made a party to the proceeding.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Midland would constitute a hazard to air navigation.

2. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better

serve the public interest, and if so, the terms conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the June 6, 1988 Petition to Deny filed by E.L. Gamble IS HEREBY DENIED.

17. IT IS FURTHER ORDERED, That the January 5, 1988 Joint Request for Approval of Settlement Agreement filed by Radio and Midland IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Radio and Midland shall file with the presiding Administrative Law Judge data regarding the area and population to receive 1 mV/m (60 dBu) service from their respective proposals.

19. IT IS FURTHER ORDERED, That Midland shall submit amendments in accordance with paragraph 13 herein to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Criswell Center for Biblical Study (BPED-831208AG) was returned on March 6, 1984. The application of Southwest Educational Media Foundation, Inc. (BPED-831215AC) was dismissed on October 6, 1986.

[2] *See, e.g., Beaumont Branch of the NAACP v. FCC,* 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC,* 832 F.2d 171 (D.C. Cir. 1987).

[3] Radio filed a Motion for Extension of Time on June 17, 1988 requesting until July 6, 1988 to file its Opposition to the Petition to Deny.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-292

In re Applications of

OPAL CARROL COLEY (hereafter "Coley")	File No. BPH-871201MC
MARK ALLEN BODIFORD (hereafter "Bodiford")	File No. BPH-871203MA
PLEASURE ISLAND BROADCASTING, INC. (hereafter "PIBI")	File No. BPH-871203MO
QUAZ COMMUNICATIONS, INC. (hereafter "Quaz")	File No. BPH-871203MR
GULF SHORE RADIO LIMITED PARTNERSHIP (hereafter "Gulf Shore")	File No. BPH-871203MV
Betty P. Barnhill d/b/a RNG COMMUNICATIONS (hereafter "RNG")	File No. BPH-871203MX
J. McCARTHY MILLER (hereafter "Miller")	File No. BPH-871203NM
COASTAL ALABAMA BROADCAST ASSOCIATES (hereafter "Coastal")	File No. BPH-871203NO
PETE WOLFF, III (hereafter "Wolff")	File No. BPH-871203NW

For Construction Permit
for a New FM Station
on Channel 298A (105.7 MHz)
in Orange Beach, Alabama

HEARING DESIGNATION ORDER

Adopted: June 13, 1989; Released: June 27, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Gulf Shore*. Information before the Commission indicates that Gulf Shore was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.,
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question Gulf Shore's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

3. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Gulf Shore has responded to Item 5(e) in the negative. However, Commission records indicate that R.L. Groat is a limited partner in the above Sedona, Arizona and Swanton, Ohio proceedings. Additionally, Bruner L. Sides is a limited partner in the above Silver Springs, Florida proceeding. However, Gulf Shore has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate 1.65 issue will be specified below.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Gulf Shore would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Section II, Item 4 of FCC 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Coley, PIBI, Quaz and Coastal have not completed Item 4 correctly. Coley's application gives a post office box number as the residence address for Opal Carrol Coley. PIBI, Quaz, and Coastal did not list the applicant, its address and the other required information. Coastal's application gives a post office box number as the residence address for Robert M. Garner and Charlotte W. Layne. Accordingly, Coley, PIBI, Quaz and Coastal must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Coley, Bodiford, PIBI, Quaz, Gulf Shore, RNG, Miller and Coastal.* Upon review of the terrain profile and coverage prediction data, we find that Coastal failed to include the 225^0 radial and RNG, Miller and Coastal failed to include the 90^0 radial in their computation of antenna heights above average terrain (HAAT). Since those radials encompass United States land area within the 50 uV/m contour the entire radial should have been included in computing the HAAT and the applications are, therefore, not in compliance with 47 C.F.R. § 73.313(d)(2). In addition, PIBI omitted the 135^0 radial and Coley omitted both the 135^0 and 225^0 radials. In this instance, the 50 uV/m contour does not encompass land area beyond the 3 to 16 kilometer portion of the radial, but that part of the radial from 3 kilometers to the outermost portion of land area along the radial must be used in the HAAT computation. Further, Quaz and Bodiford have included the 180^0 radial while Gulf Shore has included the 135^0 and 180^0 radials in their HAAT computations. However, since no United States land area is encompassed by the 50 uV/m contour and no part of the 3 to 16 kilometer portion of these radials crosses over land these radials should have been omitted from the computation of the HAAT.

7. Our analysis has concluded that one source of confusion with respect to the applicants' inclusion or omission of radials was due to the sand dunes along the coast and immediately offshore in the Gulf of Mexico that should have been considered as land area but in some instances were not. Additionally, we acknowledge that 47 C.F.R. § 73.313(d) is ambiguous as to how to interpret whether the 50 uV/m contour "encompasses" land area in the United States and, therefore, applicants reading this rule may fail to reach the proper conclusion as was the case here. We also note that the District of Columbia Circuit Court of Appeals has stated:

> The *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements: "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." [*Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 298, 404 (D.C. Cir. 1968)]. The less forgiving the FCC's acceptability standard, the more precise its requirements must be. (Footnote omitted quoting *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976).

See Rochelle C. Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985). In light of the above, we conclude that these HAAT computation discrepancies do not warrant the return of the applications. However, Coley, Bodiford, PIBI, Quaz, Gulf Shore, RNG, Miller and Coastal will be required to submit to the presiding Administrative Law Judge within 30 days of the release of this Order amendments which correct the above noted deficiencies in their HAAT computations.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
Miller	May 11, 1988, January 9, 1989
Gulf Shore	May 9, 1989

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Gulf Shore.

2. To determine whether Gulf Shore's organizational structure is a sham.

3. To determine whether Gulf Shore violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to timely report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Gulf Shore possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by Gulf Shore would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That Coley, PIBI, Quaz and Coastal each shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That Coley, Bodiford, PIBI, Quaz, Gulf Shore, RNG, Miller and Coastal shall submit an amendment in accordance with paragraphs 6-7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Miller and Gulf Shore ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 27, 1989

SOUTHWESTERN BELL TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On May 31, 1989, the Southwestern Bell Telephone Company (SWBT) filed proposed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs in response to an Order released April 10, 1989. *See Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs,* 4 FCC Rcd 3388 (1989).

Parties may file comments on the proposed revisions to the cost manual no later than **July 19, 1989.** Replies should be filed by **August 3, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 9, 1989

Released: June 9, 1989

George G. Beasley
President
Beasley Broadcast Group
Executive Offices
P. O. Box 1355
Goldsboro, North Carolina 27533

Dear Mr. Beasley:

This refers to your pending license renewal applications for stations WLIT/WYAV-FM, Conway, South Carolina. Review of the stations' EEO record reflects repeated violations of the Commission's EEO rule. Accordingly, pursuant to Section 503 of the Communications Act of 1934, as amended, this letter also constitutes a Notice of Apparent Liability for a forfeiture.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture or other remedies. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987).

Our review of your renewal applications and response to our letter of inquiry reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts over the three and one-half year period that Beasley Broadcasting of South Carolina, Inc. held the licenses.[1] First, the stations were unable to substantiate their EEO performance regarding recruitment of minorities or women during the requested period, July 23, 1985 to July 24, 1988, because of incomplete or unavailable records.[2] Nothwithstanding the lack of documentation, the stations claimed to have followed consistent recruitment procedures in filling 16 of the 36 full-time job vacancies. For those 16 vacancies, the stations indicated that they contacted 14 minority-oriented organizations and institutions[3] whenever a vacancy occurred. The stations failed to report the extent to which, if any, referrals were obtained from the 14 organizations contacted. Moreover, while the source of the referral is unclear, it appears that minorities were considered and hired for only one of these 16 vacancies. For the remaining 20 full-time vacancies, minorities were hired for two positions. The three minorities (all Black), however, were hired approximately two weeks prior to the filing of the renewal applications. Although it appears from the information that few minorities were in the applicant pool, the stations did not appear to engage in meaningful assessment of its efforts and to expand or modify their efforts to seek out applicants until after filing the instant renewal applications.

The available labor force for minorities in Horry County, South Carolina, is 19.4% (17.9% Black, 0.9% Hispanic, 0.4% Asian and 0.2% American Indian). The stations' Annual Employment Reports show either an absence or underrepresentation of minorities on their full-time staff during 1985 (0 of 19), 1986 (1 of 28), 1987 (0 of 28) and 1988 (1 of 25).[4] Although the stations reported a number of hiring opportunities for full-time positions in 1985 (7), 1986 (9), and 1987 (7), the stations selected minorities for only one of the positions during these years.[5] While the 1988 hiring information shows that three of 13 employees hired for full-time positions were Black, they were hired late in the license term.[6]

In light of these facts, we conclude that from May 15, 1985 (date acquired) to approximately two weeks before you filed the renewal applications on August 1, 1988, that stations WLIT (AM) and WYAV (FM) did not have an effective EEO program or engage in an ongoing self-assessment of their EEO efforts. Thus, there were repeated and continuing failures to comply with the Commission's affirmative action provisions set forth in Sections 73.2080(b)(5) and 73.2080(c)(2) and (5) of the rules.

In view of the foregoing, and our review of pertinent case precedent in this area, we conclude that the renewal applications for stations WLIT (AM) and WYAV (FM) should be granted for a full term, subject to reporting conditions for three years and a Notice of Apparent Liability for Forfeiture of $3,000. First, unlike the record in *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), (*Beaumont*), the instant record does not warrant designation for an evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the nearly simultaneous departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By contrast, there is no evidence to suggest a sudden, simultaneous departure of either minority or female employees in the instant case. WLIT's record also appears to be less egregious than the record of the licensee in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988) (*KYFC*) (Kansas City). In *KYFC*, we granted a short term renewal, reporting conditions and a $10,000 forfeiture upon finding that while the licensee did not have an EEO program, it hired minorities for two of 19 full-time vacancies in an area where minorities constitute 12% of the labor force. Unlike the licensee in *Kansas*

City, WLIT appears to have made some attempts to recruit minorities. In this regard, while its efforts were not fully satisfactory, WLIT stated that it did contact minority recruitment sources, such as the Horry County NAACP, NAB Job Clearinghouse, and the National Association of Black Journalists. Although the stations could not provide the number of minority referrals for each job vacancy, they assert that Blacks, one in 1987, and two in 1988, were offered and accepted full-time positions, but all failed to appear for work.[7]

Lastly, WLIT's record appears to be slightly less egregious than *WROV Broadcaster, Inc.*, FCC 89-164 (adopted: May 23, 1989) (*WROV*), in which we granted the renewal subject to reporting conditions and issued an NAL in the amount of $5,000. In *WROV*, the licensee utilized minority and/or female recruitment sources for only seven of the 65 full-time positions and only two of the 42 upper-level positions filled during the license term. Moreover, the licensee in *WROV* made little effort to recruit minorities for upper-level positions. In the instant case, WLIT and WYAV(FM), located in a labor force area that is 17.9% Black, maintained little documentation of their recruitment efforts, but reported that they affirmatively recruited for 16 of the 36 full-time positions. Thus, the effort undertaken by WLIT/WYAV(FM) appears to be slightly better than WROV.

In summary, hearing designation, as in *Beaumont, supra*, is not warranted in this case. However, reporting conditions and a lesser forfeiture than those imposed in *Kansas City, supra*, and *WROV, supra*, are warranted.

In reference to your pending assignment application, we believe that the remedies imposed *(i.e.,* the reporting conditions) should not be altered simply because of the assignment. *Wolfson Broadcasting Corp.*, FCC 89-165 (Released: June 9, 1989).

Accordingly, IT IS ORDERED, That the applications of Beasley Broadcasting of South Carolina, Inc., for renewal of licenses ARE GRANTED subject to the reporting conditions specified herein.[8]

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, Beasley Broadcasting of Sourth Carolina, Inc., is hereby advised of its apparent liability for forfeiture of $3,000 for its repeated failures to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That the licensees of stations WLIT (AM) and WYAV (FM) are directed to submit an original and one copy of the following information on August 1, 1990, August 1, 1991, and August 1, 1992:

(a) For the August 1, 1990 report, a list of all job vacancies during the twelve months preceding July 1, 1990, and for August 1, 1991 and August 1, 1992 reports, a list covering the 12 months preceding July 1, 1991 and July 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired;[9]

(b) a list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and,

(c) details concerning the stations' efforts to recruit Blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, the licensees may submit any information they believe relevant with regard to the stations' EEO performance and to their efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202) 632-7069. In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Beasley acquired the stations on May 15, 1985.

[2] In response to our inquiry for recruitment and hiring data during this period, the stations responded that "those contacts that were made cannot totally be documented from the licensee's files."

[3] The recruitment sources listed were: Horry County NAACP (Conway, SC); Mayor (N. Myrtle Beach, SC); Coastal Carolina College (Conway, SC); Benedict College (Columbia, SC); Clark College (Atlanta, GA); Malcolm X College (Chicago, IL); Howard University (Washington, DC); Jackson State University (Jackson, MS); Morgan State University (Baltimore, MD); Grambling State University (Grambling, LA); National Association of Media Women (New York); National Association of Black Journalists (Washington, DC); National Association of Hispanic Journalists; and NAB Job Clearinghouse (Washington, DC).

[4] The black full-time employee reflected on the 1988 report was promoted from a part-time position and the Black full-time employee on the 1986 report was hired on June 25, 1985.

[5] *See* note 4, *supra*. Based on the licensee's unsubstantiated recollection, the stations assert that in 1987, an announcer position was offered to and accepted by a Black female but she failed to appear for work.

[6] The stations indicate that in 1988 two additional Blacks (both females) accepted job offers but failed to appear for work.

[7] We expect licensees to fully document their recruitment efforts so that they can engage in meaningful self-assessment.

[8] In this regard, we are mindful of an assignment of license of Beasley Broadcasting of South Carolina, Inc. to Pinnacle Southeast, Inc. and we intend that the reporting conditions should apply to the assignee upon the consummation of the sale.

[9] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Equal Employment Opportunity Program of Broadcast License Renewal Applicant, Beasley Broadcasting of South Carolina, Inc., for Stations WLIT and WYAV(FM), Conway, South Carolina.

I concur in the result because I agree that this licensee should be fined and subjected to reporting conditions. I write separately because the facts warrant stronger sanctions.

WLIT(AM) and WYAV(FM) are licensed to Conway, South Carolina, in a county with a workforce that is 19.4% minority. Beasley Communications of South Carolina, Inc. ("Beasley") operated the stations for the last three and one-half years of the license term. Beasley submitted EEO information for the period from July, 1985 through July, 1988. During that period, Beasley had 36 hiring opportunities, *but hired no minority employees until two weeks before the renewal applications were filed.* Beasley claims that it contacted minority referral sources for 16 of the 36 vacancies, but could not document any of its recruitment efforts. There is no evidence that any such contacts resulted in a single referral. Nor is there evidence that Beasley ever reexamined its recruitment efforts to determine whether its program was effective.

In enforcing its equal employment opportunity policies, the Commission must consider the interplay between efforts and results. If a licensee has made a steady, good faith effort to hire and promote minority and female employees, we grant the renewal application even if the number of minorities and women hired lags behind their representation in the local workforce. Nevertheless, if a licensee consistently fails to hire minorities or women, we should scrutinize its efforts closely to determine whether the station is actually practicing affirmative action.

Beasley fell far short on both efforts and results. For three years, the stations failed to hire a single full-time minority employee. The recruitment efforts were halfhearted--even crediting Beasley's unsubstantiated assertions, Beasley contacted referral sources less than half the time. Beasley also appears to have made little or no effort to evaluate the effectiveness of its recruitment sources.

Beasley's last-minute effort to hire three minority employees--just before the renewal deadline--does not salvage a record that is otherwise abysmal. Under the circumstances, I would have imposed a higher fine and a short-term renewal with reporting conditions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-442

In the Matter of

Amendment of Section 73.202(b), RM-4724
Table of Allotments,
FM Broadcast Stations.
(San Clemente, California)

ORDER DENYING PETITION FOR STAY

Adopted: May 26, 1989; Released: June 27, 1989

By the Commission:

1. The Commission has before it a petition for stay filed by Mount Wilson FM Broadcasters, Inc. ("Mount Wilson"), licensee of FM Station KKGO, Los Angeles, California, directed to the *Memorandum Opinion and Order* in this proceeding, 3 FCC Rcd 6728 (1988).[1] The *Memorandum Opinion and Order* denied Mount Wilson's petition for reconsideration of the Commission action allotting Channel 285A to San Clemente, California. Specifically, Mount Wilson requests a stay of the processing of the applications for this allotment pending resolution of its appeal of our earlier actions to the District of Columbia Court of Appeals (Case No. 87-1289).[2]

2. In its petition for stay, Mount Wilson asserts that there is a likelihood that it will prevail on the merits of its appeal because it raised the issue of transmitter site availability during this proceeding and a transmitter site complying with the minimum spacing requirements subsequently proved to be unavailable. Mount Wilson also argues that continuing the processing of the San Clemente applications would create additional equities for the applicants which result in irreparable harm to its "chances of ultimate success." In a related vein, Mount Wilson contends that continuing the processing of the applications would result in additional expenses for the applicants and thereby harm the applicants in the event it is successful on appeal and the allotment deleted.

DISCUSSION

3. In order for us to act favorably on a petition for stay, Mount Wilson would have to satisfy the four criteria established for a stay of an administrative action.[3] These criteria are as follows: (1) has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal? (2) has the petitioner shown that without such relief, it will be irreparably injured? (3) would the issuance of a stay substantially harm other parties interested in the proceeding? and (4) where lies the public interest?

4. After careful consideration of this matter, we are of the view that Mount Wilson has not met these criteria. First of all, we continue to believe that the action allotting Channel 285A to San Clemente was a reasonable determination based on the record before us at the time of the *Report and Order*. The fact that a site complying with the minimum spacing requirements subsequently proved to be unavailable does not negate the reasonableness of that determination. Thus, we do not believe that Mount Wilson has demonstrated a likelihood of success on the merits of its appeal. Second, Mount Wilson has not shown irreparable harm if the requested stay is not granted. We do not perceive any prejudice to Mount Wilson in any subsequent proceeding by processing applications already on file.[4] In the event Mount Wilson is successful on appeal we will take whatever action mandated by the Court. Third, issuance of a stay would harm the applicants for the allotted channel by further delaying their consideration and resolution. Finally, in view of the fact that the applications for this allotment have been on file since July 12, 1985, we believe that the public interest requires us to go forward with the processing of the applications.

5. Accordingly, IT IS ORDERED, That the aforementioned petition for stay IS DENIED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Notice was given on December 15, 1988 (Report No. 1762).

[2] On February 24, 1989, the D.C. Court of Appeals issued an *Order* denying, on the merits, a similar motion for stay filed by Mount Wilson.

[3] *Virginia Petrolem Jobbers Association v. FPC*, 259 F2d 921 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F2d 841 (D.C. Cir. 1977).

[4] In this regard, we note that at the time the applications for the San Clemente allotment were filed on July 12, 1985, petitions for reconsideration were already pending against this allotment. Therefore, these applicants filed their applications with knowledge that final action on these applications was subject to the ultimate disposition of those petitions for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Deletion of AM Application Acceptance Criteria in Section 73.37(e) of the Commission's Rules	**MM DOCKET NO. 85-39** RM-3683
Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services	**DOCKET NO. 18651**

MEMORANDUM OPINION AND ORDER
(Proceeding terminated)

Adopted: May 31, 1989; Released: June 28, 1989

By the Commission:

1. The Commission has before it a petition for reconsideration of the *Report and Order* in this proceeding filed by the National Black Media Coalition and the New York affiliate, National Black Coalition, (together "NBMC" or "petitioner"). The petition was supported by National Public Radio ("NPR") and was opposed by the National Association of Broadcasters ("NAB"). No reply pleadings were filed.

2. At issue in this proceeding are the non-technical AM application acceptance criteria previously contained in Section 73.37(e) of the Commission's rules. In essence, these provisions required that an applicant for a new AM station or for a modification in an existing AM station must demonstrate service to areas or communities that have little or no service. Specifically, the applicant formerly had to demonstrate one of the following:

— at least 25% of the area or population to be served had neither AM nor FM primary service (73.37(e)(1)(i) & 2(i)); or

— the principal community to be served had fewer than two authorized local services and no FM channel was available for use there (73.37(e)(1)(ii) & 2(ii)); or

— at least 20% of the area or population of the principal community received fewer than two aural services, and no FM was available (73.37(e)(1)(iii) & 2(iii)); or

— for nighttime use of the 25 U.S. Class I-A clear channels, the applicant was a minority or noncommercial entity (73.37(e)(2)(iv)&(v)).

3. The first three of these restrictions were adopted in 1973 when the Commission became concerned that most of the dwindling space in the existing AM band might be absorbed by stations that simply would add to the already numerous AM services in the larger, more densely populated markets rather than provide service to smaller communities and rural areas.[1] The acceptance criteria were designed to focus AM growth in unserved and underserved areas and communities, particularly where FM service was unavailable. In 1980, when the Commission acted to open the way for the assignment of additional stations on the U.S. 25 Class I-A clear channels, it carried over the existing criteria, but for the first time created exceptions to allow the filing of applications by noncommercial entities and minorities even if they did not meet the criteria regarding service to unserved or underserved areas or communities (73.37(e)(2)(iv) & (v)).[2] The Commission added these exceptions to enhance opportunities for minorities and noncommercial entities to provide new services on the Class I-A frequencies in communities where they would otherwise have been precluded by the pre-existing restrictions of Section 73.37(e).

4. Because of doubts about the continuing utility of the Section 73.37(e) restrictions, the Commission proposed their deletion in the *Notice of Proposed Rule Making* in this proceeding adopted on February 13, 1985. [3] Of course, elimination of the restrictions would *perforce* make the exceptions in 73.37(e)(2)(iv) & (v) unnecessary.

5. After considering the comments filed in response to that *Notice* and based on its experience in regard to developments in AM and FM broadcasting, the Commission concluded that the non-technical application acceptance criteria no longer served a useful purpose. Rather, it found that they functioned to block otherwise possible remaining opportunities to file for new or improved service for which there was demand, thereby preventing a more efficient use of the spectrum. Accordingly, the Commission adopted the subject *Report and Order* on October 31, 1985, deleting these provisions from Section 73.37(e).[4]

6. In its petition, NBMC asserts that the Commission has not provided adequate explanation of the justifications for the steps it has taken. Specifically, it argues that the Commission has not given due recognition to the value of the deleted provisions in aiding the development of minority ownership. NBMC asserts that the minority ownership situation would have been much worse had it not been for these provisions regarding the 25 U.S. Class I-A clear channels, a point it says was ignored by the Commission. Moreover, it disputes the Commission's view that such benefits as the rule could have provided already have been realized. Particularly in view of what it contends was the short period that these acceptance criteria were in effect on the 25 U.S. clear channels (a freeze on applications having been in effect from 1982 to 1984), NBMC asserts that the rule cannot be said to have served its purpose. While NBMC agrees that minorities could benefit from the newly-created filing opportunities on other channels, it asserts that minority applicants may not be able to reap the full benefits of this rule change as they often lack the resources to pursue such filings through the comparative hearing process. Thus, NBMC urges the Commission to preserve the enhanced opportunity to file on the clear channels or to fashion a rule that opens the way for additional filings on the other channels but which limits such filings to minorities, noncommercial entities and locally owned non-minorities with no other media interests. In NBMC's view, a reversal of the Commission's action is required as there will not be another AM band once this one is saturated as a result of this proceeding.[5]

7. NPR expresses parallel views in arguing that the rule has not had a chance to have its intended effect to enhance the opportunities for noncommercial ownership. However, NPR believes the argument applies with added force in its case in view of the longer time required to prepare public radio proposals for filing. Overall, it objects to curtailing special filing opportunities on the AM band for noncommercial entities without providing an alternative route toward expanding noncommercial ownership.

8. Contrary to the assertions in the petition for reconsideration, the Commission has given extensive consideration to all facets of the former rule.[6] In reaching its decision to delete the non-technical acceptance criteria, the Commission considered the profound changes that had taken place since these provisions had been adopted. These changes were found to have an important bearing on the continuing need for the non-technical acceptance criteria as a whole. Among the most important of the developments were these: (1) the emergence of FM as the predominant aural broadcast service, which more than amply fulfilled one of the purposes of the rule; (2) FM's superior ability to fulfill the other major purposes of the rule: the provision of first primary services to places without it, and a first or second local outlet and satisfactory signals in principal communities lacking them; (3) the increasing selection, by AM applicants, of small suburban communities lacking a first or second "local" outlet as their declared "principal community"; and (4) the greatly diminished opportunity for adding new stations in the existing AM band that would provide first primary or first or second local service as a result of the nearly 5,000 stations in the AM band. Moreover, now that an International Telecommunication Union Regional Agreement has been signed, opening the way for Western Hemisphere countries to make use of the additional channels that have been allocated for AM broadcasting between 1605 kHz and 1705 kHz, additional channels are expected to become available for AM broadcasting.[7]

9. NBMC contends that we have given insufficient consideration to the impact of the rule change on increased minority ownership and to the expansion of noncommercial radio coverage. This issue was discussed in detail in the *Report and Order* (at paragraphs 20-26). With respect to elimination of the threshold showing requirement for non clear channels we found that because minority applicants, like other applicants, would no longer have to make the threshold showing of service to unserved or underserved areas in order to have their applications accepted for filing, deletion of those requirements would "have a positive effect on increasing opportunities for minority ownership of AM stations because it would open the door wider to the possibility of a larger number of new AM stations for which authorization could be sought."[8] With respect to elimination of the clear channel preference for minorities, we concluded:

> Because there are so few remaining possibilities for unlimited-time stations on these clear channels and because only in unusual circumstances would growth in this area be possible, perpetuation of the special provisions. . .cannot be viewed as a realistic means of appreciably increasing the number of minority owned stations or a justifiable means for further enlarging the number of minority-owned stations.[9]

We continue to believe that retention of these provisions would no longer serve the public interest.

10. We reiterate that, in evaluating the impact of our action it is important to recognize that the new rules regarding the non-clear channels can be expected to provide expanded opportunities for filings by minorities. For the first time, they, along with others, can now apply for AM stations in multi-station communities on the 82 channels from which the former non-technical acceptance criteria had barred *all* applicants. NBMC and NPR acknowledge these new filing opportunities but find them a less effective means of promoting ownership by minority and non-commercial applicants than direct preferences would be because minorities and noncommercial applicants might have to compete with other possible applicants in a costly comparative hearing. We recognize this possible concern but find that it is outweighed by other considerations. Little demand exists in the underserved areas that would remain available under former Section 73.37(e), and retention of the rule would serve to prevent applicants from proposing additional service in areas for which there is a real demand. In addition, retaining these eligibility restrictions, such as those proposed by NBMC, would preclude other applicants from seeking to use limited remaining AM spectrum in ways that would contribute toward the important goal of improving the technical quality of AM service. Accordingly, despite the delays and costs of comparative hearings, we find it preferable in the public interest that all those interested in providing additional service be permitted to do so.

11. Although NBMC questions the Commission's conclusions regarding the small number of additional filings that could be expected on the clear channels if we were to retain the rule, it does not present any data of its own in this regard. During the three years since we opened the way to the assignment of additional Class II unlimited-time stations on those 25 clear channel frequencies, we received over three hundred applications, many of them mutually exclusive. These filings have led to the authorization of 170 new stations with a few more remaining in hearing status. As is typical with newly available spectrum, the great bulk of the applications for new stations on the 25 U.S. clear channels were received relatively soon after they were opened for further assignments in 1980. The flow of new applications on these channels, on which minority and non-commercial applicants formerly enjoyed preferential treatment in the filing of applications, had, by 1985, slowed to a minimal number of only one or two applications a month. The facts lead to the conclusion that the vast majority of possible openings for additional stations on these channels had, by 1985, been spoken for in those places where the population is sufficient to make the building of additional stations practicable.[10] In light of our experience over more than half a century with the technical and pragmatic realities of AM allocations and the due recognition of the circumstances noted here, we again conclude that there is little realistic potential for new stations on the Class I-A clear channels in those areas and communities where former Section 73.37(e) permitted only minority or noncommercial entities to apply.[11] Accordingly, and in light of our other preferences for minorities,[12] as well as the reservation of spectrum for non-commercial entities,[13] we continue to

believe that a three-year absolute preference for minorities and non-commercial entities in certain markets was sufficient and is no longer appropriate.

12. Overall, we continue to believe that the public interest is best served by discontinuance of non-technical application acceptance criteria, and we decline to reinstate those criteria.[14]

13. Accordingly, for the stated reasons, and pursuant to authority found in 47 U.S.C. Sections 303 and 405, IT IS ORDERED, That, the subject Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Report and Order in Docket No. 18651 (Broadcast Station Assignment Standards)*, 39 FCC 2d 645 (1973).

[2] *Report and Order in Docket No. 20642 (Clear Channel AM Broadcasting)*, 78 FCC 2d 1345 (1978), *recon. denied* 83 FCC 2d 216 (1980).

[3] 50 Fed. Reg. 8169, February 28, 1985.

[4] 102 FCC 2d 548 (1985).

[5] As noted below, the AM band is to be expanded with an additional 10 channels in the 1605 - 1705 kHz band, and this may give rise to a significant number of new stations on these channels. In fact, NBMC has been an active participant in the Commission's efforts through the work of the Allocations Subgroup of the Industry Radio Advisory Committee to identify demand for this spectrum and suggest ways of responding to this demand. NPR also has been an active participant in this process.

[6] In this regard, we note that petitioner does not refute, in fact it hardly addresses, the reasons set forth for deletion of the non-technical acceptance criteria. Indeed, NBMC's petition is essentially a reiteration of the arguments that were previously made and fully addressed in our original *Report and Order*. As discussed below, we continue to believe that the decision was a sound one and that we have reasonably assessed the impact of that change on minority ownership.

[7] *Fourth Notice of Inquiry in Gen. Docket No. 84-467 (Expanded AM Band)*, 3 FCC Rcd 4497 (1988).

[8] 102 FCC 2d at 555.

[9] *Id.* We also adopted similar conclusions with respect to non-commercial entities. *Id.*

[10] NPR (as well as NBMC) notes the two-year freeze applied between March 1982 and July 1984 to grants of new stations on the 25 Class I-A clear channels, arguing that, as a result, the Commission failed to give sufficient opportunity to potential minority and noncommercial applicants to reap the benefit of the preferential treatment given. We are unable to see it in this light. As already noted, the large number of filings had, by 1985, used up most of the opportunities for which there was demand. In terms of application flow, the three years during which minorities and non-commercial entities had a preference (1980-82; 1984-85) is a long, not short time. We find no support for NPR's suggestion that this was not enough time for non-commercial entities to prepare applications.

[11] Petitioner also suggests that the Commission should find other channels on which new assignments for minority and noncommercial stations are possible. Such a proposal should not be advanced for the first time on reconsideration, and, in any event, this would not be possible to accommodate, as the other classes of established AM channels already are even more congested with densely assigned AM stations than the clear channels. Moreover, that proposal is beyond the scope of this rule making proceeding.

[12] *See* 102 FCC 2d at 557-58.

[13] *See* Sections 73.202 and 73.606 of the Commission's Rules.

[14] We note that, to the extent this minority preference is considered to fall within recent appropriations language restricting our ability to modify or eliminate certain minority preferences and policies, such restrictions do not apply since the subject preference was eliminated in 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Maritime Services Rules to permit operation on frequencies offset from assigned AMTS channels.

ORDER

Adopted: June 1, 1989; Released: June 28, 1989

By the Commission:

I. INTRODUCTION

1. This Order amends Part 80 of the Commission's Rules (Maritime Services) to permit Automated Maritime Telecommunications System (AMTS) licensees to operate on frequencies offset from assigned channels specified in Section 80.385(a)(2) of the Commission's Rules, 47 C.F.R. § 80.835(a)(2).

II. BACKGROUND

2. An AMTS is an integrated and interconnected marine communications system that provides voice and data services, somewhat like a cellular phone system, for vessels as they move along a waterway. Currently, the Commission's Rules authorize AMTSs to serve the Mississippi River System, the Gulf Intracoastal Waterway (GIWW) and the Gulf of Mexico. The AMTS allocation comprises eighty channels in the 216-220 MHz band. Each channel consists of a frequency pair. The frequency pairs begin at 216.0125 MHz for coast stations and 218.0125 MHz for ship stations and progress in increments of 25 kHz. The channels are divided into four groups of twenty labelled A, B, C, and D. AMTS channels are assigned to licensees on an exclusive basis within the specified service area.[1]

3. There is currently only one AMTS system. This system, licensed to Waterway Communications System, Inc. (Watercom), serves the Mississippi River System and the GIWW. Watercom's AMTS operates on the Group A and B channel blocks. Watercom put its system on the air in segments in 1986 and 1987.

4. On July 25, 1988, Watercom submitted a Request for Rule Waiver to Permit Operation on Offset Frequencies. Watercom states that the demand for service has steadily grown since inception of the service and that the combination of growth and the drought conditions during the summer of 1988 have placed strains on the current system's capacity and on Watercom's ability to handle the traffic requirements.[2] Low water levels have caused vessels to "bunch" at various points along the rivers and have caused increased communications requirements between vessels and their offices. Watercom states that it is experiencing blocking of some of its frequencies due to the increased usage and requests authority to use offset frequencies on a permanent basis.[3]

5. Watercom argues that because it is the sole user of the Group A and B frequencies it has, in effect, been granted a block frequency assignment and that authorization to use offset frequencies would result in increased channel utilization without affecting any other party. Additionally, it points out that no other party could use the offset frequencies in Groups A and B without causing harmful interference to the Watercom system. On August 5, 1988, Watercom was granted special temporary authority (STA)[4] to permit it to use offset frequencies in assigned Group A and B channels.[5] This action alleviated the blocking problem brought on by the low water conditions in the Mississippi River System.

6. On September 19, 1988, Riverphone, Inc. t/a Maritel (Riverphone) filed comments addressing the Watercom Request. Riverphone generally supported the concept of permitting the use of AMTS offset frequencies, but opposed granting Watercom's waiver request. Riverphone argues that the best course is to grant Watercom special temporary authority or a developmental authorization and also initiate a rule making proceeding.[6] Riverphone contends that the use of offset frequencies should be examined at greater length and that resultant benefits should not accrue solely to Watercom. Potential competitors as well as the public at large should also benefit.[7] Riverphone further indicates that Watercom's use of offset frequencies might result in some excess capacity and that any such excess should result in some AMTS channels being made available to other licensees.[8]

7. In a Response to Riverphone filed September 30, 1988, Watercom notes that no other potential licensee can utilize the offset frequencies in the Group A and B channel blocks currently licensed to Watercom, and that granting Watercom's waiver request would constitute no more than a grant of authority "solely internal to the license authority already conferred upon Watercom."[9] Accordingly, Watercom agrees with Riverphone's suggestion that we amend our Rules to authorize the use of offset frequencies in the currently unlicensed AMTS channel blocks when they are licensed.[10] In a Reply filed October 7, 1988, Riverphone reiterates its view that Watercom's Request is not merely a matter of waiver of internal technical standards but rather represents a change in channelling requirements which should be available generally to potential AMTS licensees.[11]

III. DISCUSSION

8. Removing channelling restrictions to permit AMTS licensees to utilize offset frequencies will encourage more efficient use of the spectrum. Because AMTS channels are assigned to licensees on an exclusive basis within their specified service areas, no other party could use this spectrum if AMTS licensees are not granted the requested authority. Further, no other party would be exposed to any increased potential for harmful interference because all other technical parameters will remain unchanged. AMTS licensees would be permitted to operate on offset frequencies only when they are assigned the channels on each side of the offset frequency. This approach is fully consistent with our policy in other radio services.[12]

9. Amending the rules to permit AMTS licensees to operate on offset frequencies will allow Watercom the spectrum efficiency and flexibility it seeks in its waiver request. It also satisfies Riverphone's concerns by providing the same channelization flexibility to the eventual

licensees of the remaining AMTS channel blocks. We reject, however, Riverphone's argument that any Watercom "excess capacity" resulting from utilization of offset frequencies be made available to future AMTS applicants. Our decision to authorize the use of offset frequencies recognizes that our block frequency assignments make the existing licensee of a block the only potential user of the offsets within that block, thereby promoting spectrum efficiency with no additional interference potential. Riverphone's suggestion is inconsistent with these considerations as it would undercut our block AMTS authorization policies as well as create new interference issues. In any event, there is nothing in the record to indicate that Watercom has or will have excess capacity or underutilized channels.[13] Therefore, we conclude that AMTS licensees should be permitted to operate on frequencies offset from assigned channels provided the licensees are licensed for channels on each side of the offset frequency and the operation conforms with all other technical parameters.

IV. PROCEDURAL MATTERS

10. This amendment has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to contain no new or modified form, information collection or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

11. This rule amendment provides AMTS licensees technical flexibility in the use of spectrum exclusively assigned to them in specified service areas. The only existing AMTS licensee requested this capability and a commenter supported the approach taken herein. This action benefits the public and adds no additional burdens. The change is thus noncontroversial and therefore constitutes a minor amendment to our Rules in which the public is not likely to be interested. Therefore, we find for good cause that compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. § 553(b)(B). In addition, because only one licensee will be immediately affected by this amendment and because that licensee already is operating on offset frequencies within Groups A and B under an STA, we find good cause to allow AMTS licensees to operate on frequencies offset from AMTS channels effective immediately. Therefore, this rule amendment will be effective upon publication in the Federal Register. *See* 5 U.S.C. §§ 533(d).

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Section 80.385 of the Commission's Rules, 47 C.F.R. § 80.385, IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.385 is amended by redesignating the existing paragraph "(b)" to paragraph "(c)", and by adding a new paragraph "(b)" to read:

* * * * *

(b) *Narrowband operations in AMTS.* AMTS licensees may operate on frequencies offset from the assignable channels specified in paragraph (a)(2) of this section provided such licensees are also licensed for channels on each side of the offset frequency. Licensees using offset frequencies must conform with all other conditions of operation.

* * * * *

FOOTNOTES

[1] *See* 47 C.F.R. §§ 80.385, 80.475, 80.477.

[2] Request for Rule Waiver to Permit Operation on Offset Frequencies at 2 (July 25, 1988)(Watercom Request).

[3] *Id.* at 2-3.

[4] The STA was granted by the Chief, Special Services Branch, Licensing Division, Private Radio Bureau.

[5] "Offset frequency" is used here to mean a frequency removed from an assigned carrier frequency by a value that is smaller than the normal channel spacing.

[6] Comments of Riverphone, Inc. t/a Maritel at 4-6 (Sept. 19, 1988).

[7] *Id.* at 5-6.

[8] *Id.* at 6.

[9] Watercom Request at 3.

[10] Response of Waterway Communications System, Inc. at 4 (Sept. 30, 1988). Watercom challenged Riverphone's standing to file comments, saying that Riverphone is not "a party in interest." *Id.* at 1-2. We will, however, consider Riverphone's comments. *See* 47 C.F.R. § 1.41.

[11] Reply of Riverphone, Inc. t/a Maritel at 2 (Oct. 7, 1988).

[12] *See, e.g., Report and Order*, PR Docket No. 86-169, 2 FCC Rcd 665 (1987); *Report and Order*, PR Docket No. 84-279, released Mar. 29, 1985, 50 Fed. Reg. 13596 (Apr. 5, 1985); *Report and Order*, MM Docket No. 84-280, released Nov. 6, 1984, 49 Fed. Reg. 45155 (Nov. 15, 1984).

[13] Of course, we reserve the right to revisit the issue of excess capacity in a future proceeding, should circumstances so warrant.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-295

In the Matter of

Amendment of Parts 2 and 87 of the Commission's Rules to permit the Aviation Services to use frequencies in the 136-137 MHz band.	RM-6620 RM-6649

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: June 28, 1989

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making proposes to amend Parts 2 and 87 of the Commission's Rules, 47 C.F.R. Parts 2 and 87, to permit mobile stations in the aviation services to use certain frequencies in the 136-137 MHz band. We are initiating this rule making in response to two petitions. One petition (RM-6620) was filed by Aeronautical Radio, Inc. (ARINC)[1] and the other (RM-6649) by the American Petroleum Institute (API).[2]

II. BACKGROUND

2. Currently, frequencies in the 136-137 MHz band are allocated to the Space Operation (Space-to-Earth), Meteorological-Satellite (Space-to-Earth) and Space Research (Space-to-Earth) Services on a primary basis, and Fixed and Mobile Services, except Aeronautical Mobile (R) Service,[3] on a secondary basis. The 1979 World Administrative Radio Conference (1979 WARC) reallocated the 136-137 MHz band to the Aeronautical Mobile (R) Service[4] on a primary basis, effective January 2, 1990. At that time, all services that were using the band on a primary basis are reduced to secondary status.[5] Additionally, the 1987 World Administrative Radio Conference for the Mobile Services (WARC Mob-87) specified the following:

> (a) Requested administrations to refrain from authorizing new assignments in the 136-137 MHz band starting January 1, 1990, to the services that are authorized on a secondary basis;
>
> (b) Recommended that administrations cease operation of stations of the other services to which the band is allocated on a secondary basis when Aeronautical Mobile (R) Service stations come into operation; and
>
> (c) Recommended that a future competent world administrative radio conference consider the deletion of all secondary allocations from the 136-137 MHz band.[6]

III. PETITIONS

3. *ARINC Petition:* ARINC states that domestic air passenger boardings increased from 254 million in 1978 to more than 415 million in 1987. It notes that in spite of this growth the aviation community has continued to meet its expanding communications needs within the previously allocated 117.975-136.000 MHz band. ARINC points out, however, that recent studies indicate that channels in the aeronautical enroute service band (128-132 MHz) are normally fully assigned and are experiencing peak channel utilization of 61 percent resulting in queues of approximately 35 seconds. The recommended industry peak safety limit for channel utilization, according to ARINC, is 45 percent. ARINC states that, in the past, to reduce congestion in the aeronautical enroute service it has reduced adjacent channel protection, employed time sharing, colocated adjacent channel assignments and combined the daytime requirements of passenger carriers with the nighttime requirements of cargo carriers. ARINC argues that it cannot continue to meet the expanding enroute communication needs by using these techniques. ARINC petition at 5 and 6.

4. Additionally, ARINC contends that it has promoted efficient use of the aeronautical enroute service spectrum by establishing the ARINC Communications Addressing and Reporting System (ACARS).[7] According to ARINC, ACARS includes 217 ground stations serving more than 2,000 aircraft and processing 3,600,000 messages a month. It serves primarily the commercial airline industry but increasing numbers of corporate aircraft are using this system. In keeping pace with the increasing demand for data communications ARINC states that ACARS will require additional channels to improve its capacity and reliability. ARINC petition at 6 and 7.

5. ARINC concedes that other aviation services are also experiencing channel congestion and may need additional spectrum. It believes that consideration should be given to other aviation services provided that their additional needs are appropriately justified. Although ARINC's petition asked that the entire 136-137 MHz band be made available for aeronautical enroute communications, it modified its position in its reply comments and now requests that thirty of the available forty channels be made available for enroute communications. ARINC reply comments at 8 and 9. Further, ARINC recommends that the current agreement between the United States and Canada concerning the assignment of aeronautical enroute channels in the 128-132 MHz band[8] be extended to the 136-137 MHz band. ARINC petition at 9 and 10. The National Business Aircraft Association (NBAA) supports ARINC's petition. NBAA comments at 1.

6. The Federal Aviation Administration (FAA) filed comments opposing the assignment of the entire 136-137 MHz band for aeronautical enroute services. The FAA argues that this scarce spectrum resource should be made available for assignment to other aviation services, such as the aeronautical advisory service (unicom), automatic terminal information service (ATIS), automatic weather observation service (AWOS) and air traffic control services. The FAA points out that the growth of the aviation industry referenced by ARINC has resulted in frequency congestion in all aviation radio services and that air carrier aircraft, the primary beneficiaries of aeronautical enroute services, are only a small percentage of the total United States aircraft population. The FAA indicated that it would work with the Commission's staff to develop a

plan for assignment of channels to specific services. FAA comments at 1 through 4. In reference to ARINC's reply comments, FAA modified its position and recommended that ten channels be made available for aeronautical enroute services and the remaining thirty channels allotted to other aviation services.[9]

7. The Aircraft Owners and Pilots Association (AOPA) and the Helicopter Association International (HAI) oppose ARINC's petition and support FAA's comments. AOPA comments at 1, HAI comments at 1. AOPA further suggests that Commission and FAA staffs work with members of the aviation community to formulate a plan for the assignment of the lower portion of the 136-137 MHz band for unicom and other aviation services. AOPA comments at 3. API also opposes ARINC's petition and sets forth its own proposal in a petition described below.

8. *API Petition:* API states that its members and service contractors use 700 to 850 helicopters in the Gulf of Mexico to ferry personnel and materials between offshore facilities and land-based offices and support depots. API points out that the helicopter community uses digital data transmissions to relay position information back to headquarters. It contends that this flight following system enhances safety and decreases insurance costs. In addition, API states that extensive use of this system may enable the industry to develop an air traffic management system to help prevent accidents, such as mid-air collisions that may occur when two helicopters are approaching the same platform simultaneously. API petition at 3, 4, and 5.

9. Aeronautical enroute frequencies may be used for voice and data communications.[10] API argues that the "efficiency of data, the benefits of developing flight following technology, and the large number of helicopters which operate in the confined area bounded by approximately 5-600 miles of the Gulf Coast, call for recognition of and provision for data communications for the offshore helicopter industry." API petition at 5. Therefore, API requests the Commission to allot 10 channels in the 136-137 MHz band for enroute digital communications with helicopters operating along the Gulf of Mexico and to restrict any other assignment of these channels within 180 miles of the Gulf coast. API also requests that the use of these 10 dedicated channels be exempt from the one licensee per location provision contained in Section 87.261(c) of the Rules, 47 C.F.R. § 87.261(c). Additionally, API requests that frequency coordination be required prior to the submission of any application for these channels and proposes that it be designated the frequency coordinator for these channels. API petition at 5, 6 and 7.

10. AOPA opposes the API petition[11] and urges the Commission to delay its decision regarding the assignment of the 136-137 MHz channels until it is determined how many of these channels will be subject to coordination with Canada. AOPA supports the proposal contained in the FAA comments to the ARINC petition. Comments of AOPA at 1 and 2. ARINC requests that the API petition be dismissed. ARINC contends that the needs of the Gulf helicopter operators are not much different from those of other aircraft operators and, therefore, API's needs can be satisfied by granting the ARINC petition. Furthermore, ARINC argues that API has not explained fully how the 10 dedicated channels will be used or how many of the 700-850 helicopters are actually using these digital systems today. ARINC states that it has been approached only by Chevron Industries to coordinate the use of a similar system in the Gulf of Mexico for approximately 60 helicopters. ARINC comments at 4 and 5.

11. API strongly disagrees with ARINC regarding ARINC's ability to provide the enroute communications services required by the helicopter community in the Gulf of Mexico. API states that in recent years a fleet of 700 to 850 helicopters are operating in a narrowly confined region in the Gulf Coast primarily along and offshore the Louisiana and Texas coastal zones. During the morning peak hours as many as 60 percent of the fleet may be airborne at one time. Although ARINC claims that only Chevron has requested frequencies for digital data transmissions, API contends that at least five Gulf Coast helicopter fleets have been or are equipped for such operations, including helicopters operated by the FAA, plus several fleets in other parts of the country. API, however, urges the Commission to look beyond today's requirements and provide for the needs of the entire Gulf Coast helicopter fleet for a flight following system that will enhance the safety and economy of operations. In conclusion, API states that ARINC does not represent the interests of the helicopter operator community and requests the Commission to allot the proposed 10 channels in the geographic area described to satisfy the requirements of API members. Reply comments of API at 1 through 6.

IV. DISCUSSION

12. The petitioners and commenters all agree that we should initiate a proceeding to authorize the use of the 136-137 MHz band by the aviation community after the band becomes available in 1990. They do not agree, however, on how the forty available channels should be shared among the various aviation services. To further complicate this matter, as noted by these parties, we must also coordinate the use of this spectrum with Canada.

13. We find merit in the arguments presented by the petitioners and commenters regarding the need for additional channels in the aviation services. The recommendations of all of these parties obviously cannot be fully satisfied with the forty available channels. ARINC seeks thirty channels for aeronautical enroute services, API asks for ten channels dedicated to helicopter digital enroute communications in the Gulf of Mexico, while FAA, AOPA, and HAI suggest that the unicom and other aviation services be allotted thirty channels. Accordingly, a compromise among the recommended allotments of the available channels must be found.

14. We believe a fair compromise in this case is to allot twenty channels for aeronautical enroute services, fifteen for general aviation[12] uses such as AWOS, ATIS, air-to-air coridor advisory and airport control tower communications and temporarily reserve five channels for future unicom or AWOS operations. The twenty aeronautical enroute channels would be in the upper half of the 136-137 MHz band and include eight channels for special purpose enroute services such as the helicopter flight following system API supports. The fifteen channels alloted for general aviation use and the five reserved channels would be located in the lower half of the band.

15. This approach would make available additional channels to alleviate the frequency congestion that currently exists in the aviation services. The eight channels available for special purpose enroute services would not

be subject to the "one aeronautical enroute station licensee per location" restriction contained in Section 87.261 of the Rules, 47 C.F.R. § 87.261. These eight channels would be selected from those channels in the band that are available to Canada. Rather than designate a specific private entity as the frequency coordinator for these eight channels as requested by API, we propose to coordinate the assignment of these few channels. The eight channels would be available to satisfy the requirements of segments of the aviation community such as the Gulf helicopter operators for special enroute communications services. Accordingly, we propose to allot twenty channels for aeronatical enroute operations, fifteen channels for general aviation use and keep five channels in reserve.

16. Although the 136-137 MHz band is allocated for non-Government use, many aviation services such as ATIS, AWOS and airport control tower services may be provided by either Government (FAA) or non-Government facilities at any given location. Therefore, we propose to revise footnote US244 to the Table of Frequency Allocations in Part 2 (47 CFR Part 2) to allow the FAA to access on a shared basis the fifteen channels proposed for the general uses discussed above.

17. As pointed out above, the use of the 136-137 MHz band will be subject to a channeling arrangement between the United States and Canada. Although we are in the early stages of discussions with Canada, for the purposes of this Notice we have assumed that the channeling arrangement, for the 136-137 MHz band will be similar to the 1962 Agreement for the 128-132 MHz band.[13] Based on this assumption, we have proposed specific frequencies in the attached rules (Appendix A). Appendix B sets forth one possible channeling arrangement for the 136-137 MHz band based on this assumption.

V. CONCLUSION

18. For the reasons stated above, we propose to amend Part 87 of the Rules to make thirty-five frequencies in the 136-137 MHz band available for aeronautical stations beginning January 2, 1990. Twenty frequencies would be available for enroute communications, eight of which would be available for special purpose enroute services. Fifteen other frequencies would be available to FAA on a shared basis for air traffic control purposes. The remaining five frequencies in the band are proposed to be temporarily held in reserve for future unicom and AWOS services.

19. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

20. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

21. Authority for issuance of this Notice is contained in Sections 4(i), 303(g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **August 11, 1989,** and reply comments on or before **August 28, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

22. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

23. The Commission hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), that these rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. Although these proposed changes allow the aviation community greater flexibility in the selection of operating frequencies and may result in some expenditures for equipment, these additional, optional expenditures should be minimal.

24. IT IS ORDERED that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 2 and 87 of Chapter I Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS.

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, 307, 48. Stat. 1066, 1082, as amended; 47 U. S. C. 154, 302, 303, 307, unless otherwise noted.

2. In Section 2.106, United States footnote US244 is revised to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

UNITED STATES (US) FOOTNOTES

* * * * *

US244 The band 136.000-137.000 MHz is allocated to the non-Government aeronautical mobile (R) service on a primary basis, and is subject to pertinent international treaties and agreements. The frequencies 136.000 MHz, 136.025 MHz, 136.050 MHz, 136.075 MHz, 136.125 MHz, 136.150 MHz, 136.175 MHz, 136.225 MHz, 136.250 MHz, 136.300 MHz, 136.325 MHz, 136.350 MHz, 136.400 MHz, 136.425 MHz and 136.450 MHz are available on a shared basis to the Federal Aviation Administration for air traffic control purposes, such as automatic weather observation services (AWOS), automatic terminal information services (ATIS) and airport control tower communications. Existing stations using the 136-137 MHz band as an alternative allocation to the space operation (space-to-earth), meteorological-satellite service (space-to-earth) and the space research service (space-to-earth) may continue to use this band on a secondary basis to the aeronautical mobile (R) service stations. No new assignments will be made to stations in the above space services.

* * * * *

B. PART 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. In Section 87.137, paragraph (a), Footnote 5 is amended by removing the period after § 87.263(a)(1) and adding "and (5)."

3. In Section 87.173, the frequency table in paragraph (b) is amended by adding the following four columnar entries in frequency numerical order:

136.000-136.075 MHz	O, S	MA, FAC, FAW	Air traffic control operations
136.100 MHz			Reserved for future unicom or AWOS
136.125-136.175	O, S	MA, FAC, FAW	Air traffic control operations
136.200 MHz			Reserved for future unicom or AWOS
136.225-136.250 MHz	O, S	MA, FAC, FAW	Air traffic control operations
136.275 MHz			Reserved for future unicom or AWOS
136.300-136.350 MHz	O, S	MA, FAC, FAW	Air traffic control operations
136.375 MHz			Reserved for future unicom or AWOS
136.400-136.450 MHz	O, S	MA, FAC, FAW	Air traffic control operations
136.475 MHz			Reserved for future unicom or AWOS
136.500-136.600 MHz	I	MA, FAE	Domestic VHF
136.625 MHz	I	MA, FAE	Domestic VHF (special)
136.650 MHz	I	MA, FAE	Domestic VHF
136.675 MHz	I	MA, FAE	Domestic VHF (special)
136.700 MHz	I	MA, FAE	Domestic VHF
136.725 MHz	I	MA, FAE	Domestic VHF (special)
136.750 MHz	I	MA, FAE	Domestic VHF
136.775 MHz	I	MA, FAE	Domestic VHF (special)
136.800 MHz	I	MA, FAE	Domestic VHF
136.825 MHz	I	MA, FAE	Domestic VHF (special)
136.850 MHz	I	MA, FAE	Domestic VHF

136.875 MHz	I	MA, FAE	Domestic VHF (special)
136.900 MHz	I	MA, FAE	Domestic VHF
136.925 MHz	I	MA, FAE	Domestic VHF (special)
136.950 MHz	I	MA, FAE	Domestic VHF
136.975 MHz	I	MA, FAE	Domestic VHF (special)

4. In Section 87.263, paragraph (a)(1) is revised and a new paragraph (a)(5) is added to read as follows:

§ 87.263 Frequencies.

(a) Domestic VHF Service.

(1) The frequencies in the 128.825-132.000 MHz band and the frequencies 136.500 MHz, 136.525 MHz, 136.550 MHz, 136.575 MHz, 136.600 MHz, 136.650 MHz, 136.700 MHz, 136.750 MHz, 136.800 MHz, 136.850 MHz, 136.900 MHz and 136.950 MHz are available to serve domestic routes. Frequency assignments are based on 25 kHz spacing. Proposed operations must be compatible with existing operations. Use of these frequencies must be in accordance with pertinent international treaties and agreements.

* * * * *

(5) The frequencies 136.625 MHz, 136.675 MHz, 136.725 MHz, 136.775 MHz, 136.825 MHz, 136.875 MHz, 136.925 MHz and 136.975 MHz are available for special purpose assignment to aeronautical enroute stations. Frequency assignments will be based on 25 kHz channel spacing, will be coordinated by the Commission and are not subject to the conditions contained in § 87.261(b), (c) and (d), and paragraph (a)(2) of this Section. Use of these frequencies must be in accordance with pertinent international treaties and agreements.

5. In Section 87.421, the introductory text is revised to read as follows:

§ 87.421 Frequencies.

The Commission will assign VHF frequencies after coordination with the FAA. Frequencies in the following bands are available to control towers. Channel spacing is 25 kHz.

118.000-121.400 MHz	136.125-136.175 MHz
121.600-121.925 MHz	136.225-136.250 MHz
123.600-128.800 MHz	136.300-136.350 MHz
132.025-136.075 MHz	136.400-136.450 MHz

* * * * *

APPENDIX B

One Possible Channeling Arrangement for 136-137 MHz (Channeling arrangement and usage subject to US/Canada agreement)

	WITHIN APPROPRIATE COORDINATION ZONE		BEYOND APPROPRIATE COORDINATION ZONE
Freq. MHz	**U.S.A.**	**CANADA**	**U.S.A.**
136.000	X (F)		X (F)
136.025	X (F)	X	X (F)
136.050	X (F)	X	X (F)
136.075		X	X (F)
136.100	X (R)		X (R)
136.125	X (F)	X	X (F)
136.150	X (F)	X	X (F)
136.175		X	X (F)
136.200	X (R)		X (R)
136.225	X (F)	X	X (F)
136.250	X (F)	X	X (F)
136.275		X	X (R)
136.300	X (F)		X (F)
136.325	X (F)	X	X (F)
136.350	X (F)	X	X (F)
136.375		X	X (R)
136.400	X (F)		X (F)
136.425	X (F)	X	X (F)
136.450	X (F)	X	X (F)
136.475		X	X (R)
136.500	X (A)		X (A)
136.525	X (A)	X	X (A)
136.550	X (A)	X	X (A)
136.575		X	X (A)
136.600	X (A)		X (A)
136.625	X (B)	X	X (B)
136.650	X (A)	X	X (A)
136.675		X	X (B)
136.700	X (A)		X (A)
136.725	X (B)	X	X (B)
136.750	X (A)	X	X (A)
136.775		X	X (B)
136.800	X (A)		X (A)
136.825	X (B)	X	X (B)
136.850	X (A)	X	X (A)
136.875		X	X (B)
136.900	X (A)		X (A)
136.925	X (B)	X	X (B)
136.950	X (A)	X	X (A)
136.975		X	X (B)

Notes: 1. The frequency coordination zones for co-channel assignments are:

Type of Station	Altitude Level (feet)	Coordination Zone (n.m.)
Ramp	Ground level	50
Helicopter	0 to 2,000	150
Low level	0 to 10,000	250
Mid level	0 to 20,000	400
High level	Over 20,000	600

2. Letter in parenthesis indicates proposed usage as follows:

(A) Enroute communications in accordance with § 87.261 of the Rules.

(B) Special purpose enroute communications in accordance with proposed § 87.263(a)(5) of the Rules.

(F) Available to the Government (FAA)/non-Government entities for air traffic control purposes, such as, automatic weather observation services (AWOS), automatic terminal information services (ATIS) and airport control tower communications.

(R) Reserved.

FOOTNOTES

[1] ARINC is a communications company established to coordinate and provide aeronautical enroute telecommunication services and facilities to the aviation industry. More specifically, it provides air-to-ground and ground-to-air communications for the regularity and efficiency of flight and the safety of aircraft, *i.e.*, communications regarding fuel, weather, aircraft performance, position reports and many other administrative services. ARINC's principal stockholders and customers are the United States scheduled airlines. A number of corporate and general aviation operators also own shares in ARINC. ARINC provides its services to all aircraft operators, including foreign airlines, business and private aircraft on a not-for-profit, cost sharing, basis.

[2] API is a national association representing approximately 200 companies and more than 5,000 individual members engaged in the exploration, production, refining, marketing and transportation of petroleum products and natural gas.

[3] The Aeronautical Mobile (R) Service is defined as follows: "An aeronautical mobile service reserved for communications relating to safety and regularity of flight, primarily along national or international civil air routes." *See* international Radio Regulations No. 34A (Geneva 1979). The symbol "(R)" indicates that such routes are nationally or internationally pre-established.

[4] In the United States, after January 1, 1990, the frequencies in the 136-137 MHz band are allocated for non-Government aeronautical mobile (R) operations. *See* Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106, and National Telecommunications and Information Administration (NTIA), *Manual of Regulations and Procedures for Federal Radio Frequency Management* § 4.1.3 (rev. ed. 1989).

[5] *See* international Radio Regulations No. 595 and Recommendation No. 404 (Geneva 1979).

[6] *See* Resolution No. 408 of the Final Acts of WARC Mob-87 (Geneva 1987).

[7] ACARS is a very high frequency (VHF) data link that serves the continental United States, Alaska, Hawaii, Bermuda, Puerto Rico and selected locations in Canada and Mexico. The ACARS network provides complete enroute and on-ground coverage throughout the continental United States, with on-ground coverage at 210 airports. The ACARS is used to transmit data automatically between ground personnel and aircraft, including reports on departure and destination, location and time, engine monitoring, aircraft flight position, maintenance discrepancy reports, and winds aloft observations from suitably equipped aircraft.

[8] *See* Agreement on Telecommunication: Coordination and Use of Radio Frequencies Above 30 Megacycles per Second, Oct. 24, 1962, United States-Canada, T.I.A.S. No. 5205. Pending revision of the Agreement, in 1977, the Commission and Canada's Department of Communications agreed on interim procedures for assignments in the 128-132 MHz band. *See also* Letter from Richard E. Wiley, Chairman to Mr. M.F. Yalden, Deputy Minister of Communications (Sept. 27, 1977) (transmitting U.S.A./Canada Interim Channelling Arrangement for the Mobile(R)/(Enroute) Service Utilizing 25 kHz Channels for the Band 128.8125-132.0125 MHz".

[9] *See* Letter from Gerald J. Markey, Manager, Spectrum Engineering Division, FAA to Robert McNamara, Chief, Special Services Division, FCC (Feb. 28, 1989).

[10] *See* § 47 C.F.R. 87.137(a)(1), footnote 5.

[11] AOPA and ARINC filed comments to the API petition. Reply comments were filed by API. Late comments were filed by NBAA.

[12] General aviation consists of all aircraft other than scheduled air carrier and military aircraft.

[13] *See* footnote 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1989; Released: June 28, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. In an Order released April 6, 1987, in CC Docket Nos. 80-634 and 85-268, the Common Carrier Bureau tentatively concluded that the Communications Satellite Corporation (Comsat) must refund $61.7 million in revenues accrued in 1983-86 which exceeded a 1978 rate of return prescription.[1] The *April 1987 Order* directed Comsat to show cause why the excess revenues should not be refunded and to propose a refund schedule and methodology for public comment, in the event excess revenues were ultimately refunded. Comsat submitted, on July 10, 1987, a response to the show cause Order and a proposed refund methodology and schedule which suggested making refunds payable on a prospective basis, and allocating refunds among service categories based on each category's contribution to the refund pool.[2] Comsat would continue to charge its tariffed rates, but each invoice for service provided would reflect a per-circuit credit corresponding to the per-circuit refund allocated to that service.[3] Comsat asked the Commission to approve this methodology or specify another.[4] The Commission received comments and replies on Comsat's proposal.

2. After considering the record and the unique factual circumstances presented, the Commission released its *January 1988 Order* limiting Comsat's refund liability to revenues accrued by Comsat during the period from August 1, 1984, to December 31, 1986, in excess of its 1978 Settlement Agreement prescription.[5] This Order mandated refunds totaling approximately $39 million, to be refunded as a lump sum.[6] In a petition filed February 24, 1988, Comsat asked the Commission to rescind its directive that Comsat pay refunds to its end-user customers before paying refunds to its carrier customers. A Common Carrier Bureau Order released February 26, 1988,[7] deferred Comsat's disbursement obligation, and established this docket "to determine the method and procedure for a fair and equitable distribution of the refund obligation . . . ." *Id.* at 1131. We invited comments "on flow-through issues, and proposals for the distribution of refunds among Comsat's customers, . . . " *Id.* This Order relates to the allocation of the refund obligation. Flow-through questions will be addressed in a subsequent order.

II. SUMMARY OF PLEADINGS

3. Comsat's original proposed allocation is described above. On February 24, 1988, Comsat submitted with its petition a refund calculation methodology based on the ratio of the amount received by each of the three relevant Comsat entities – WSD, CICI, and ISS – from each customer, to the total received from all customers by each entity.[8] Comments were received following Comsat's July 1987 submission,[9] and again in response to the Commission's *January 1988 Order*, the Bureau's *February 1988 Order*, and Comsat's February 1988 proposed methodology.[10] We summarize below the relevant arguments regarding Comsat's refund allocation proposal and the estimated amounts owed each customer.

A. *Allocation Methodology*

4. In its comments, AT&T states without elaboration that it supports Comsat's proposed refund method. AT&T Comments at 2.[11] FTCC suggests that refund shares be allocated, very simply, by calculating a ratio of the total refund to Comsat's total gross revenue during the period in question, and applying that ratio to the customer's payments during the same period. FTCC Comments at 6.[12] MCI generally accepts Comsat's proposed allocation methodology, but urges requiring Comsat to use separate calculations for several discrete time periods: MCI would add calendar year separations to Comsat's proposed separation between WSD and ISS-CICI periods. MCI Comments at 15.[13] The Networks endorse Comsat's proposed methodology, noting that it treats all customers consistently. Networks Comments at 3-4.

5. RCAGC cites an Order in the CC Docket No. 85-166 special access tariff investigation[14] to support its suggestion that Comsat be required to provide all calculations of refund allocation, as well as the data underlying such calculations. RCAGC Comments at 3. RCAGC states that it has no strong views about the calculation methodology to be used, and does not object to Comsat's proposal. It asks the Commission to assure, however, that, whatever methodology is used, Comsat will be required to provide adequate supporting data to allow customers to confirm Comsat's results. *Id.* at 5.

6. TRT suggests that there should be a non-discriminatory distribution of the required refunds to all of Comsat's customers in proportion to the charges paid by each customer during the refund period. TRT Comments at 3, 4-7.[15] TRT is in general agreement with Comsat's proposed methodology, but questions Comsat's intention to calculate excess revenues separately for space and earth segments. *Id.* at 5. TRT notes that Comsat does not specify how it would do this, and that the *January 1988 Order* does not set forth excess revenues in this manner. *Id.* at 5-6. TRT suggests the following alternative method: (1) Comsat should calculate the ratio of the refund amounts shown in Appendix C of the *January 1988 Order* to the total charges collected by Comsat in each period; (2) Comsat should apply these ratios to the total charges paid by each customer in each period, to arrive at the refund due each customer; and (3) Comsat should then distribute interest among customers in the same proportion as the refund amounts. *Id.* at 6.

7. Turner supports Comsat's proposal. Turner Comments at 1.[16] Western Union argues that the overcharging carrier should be required to document its proposal. Western Union Further Comments at 2.[17]

8. The Comsat reply notes that most parties have approved of its allocation methodology, though some modifications have been suggested. Comsat states that it is ready and willing to make the allocations and to provide supporting data, but requests that the Commission first resolve certain details remaining in question, including: (1) the time periods to be used, in view of MCI's suggestion that separate computations be performed for calendar years, and FTCC's suggestion that any division of the refund period be eliminated; (2) the calculation of individual refund amounts, as between the methodology suggested by Comsat and that suggested by TRT; and (3) the Turner refund request. Comsat Reply at 2-3.[18]

B. ***Amount of Refund Due***

9. AT&T uses Comsat's proposed allocation methodology to calculate its share of the Comsat refund as $29.07 million. AT&T Comments at 2. Contel states that it was a Comsat customer during the refund period, and so is due some amount, but that it is unable to calculate how much. Contel Comments at 1. FTCC states that available data permit only very crude calculations, but that a rough estimate of FTCC's share could be calculated by taking the ratio of the refund to Comsat's total gross revenue during the period in question (which FTCC does not calculate) and applying that ratio to FTCC's payments of about $7 million during that period. FTCC Comments at 6. MCI, in its reply comments, estimates its share of the refund as $1.657 million. MCI Reply at 8. The Networks offer no estimate of the amount of refund they believe is due them.

10. RCAGC notes that Comsat suggests calculating shares of refunds due by proportion to total refund owed, based on the proportion of circuits used by a particular customer to total circuits used. This method is not practicable, RCAGC contends, because customers cannot be sure of the total number of circuits used by all of Comsat's customers, nor of the total revenue resulting, as these data are inconsistently reported on Form M and monthly Form 901 reports. Therefore, RCAGC argues, no customer can ascertain its individual share of circuit usage. RCAGC Comments at 1-3. Nonetheless, RCAGC offers a rough estimate of $1 million as its share of Comsat's refund. *Id.* at 2. Using its own suggested methodology, described above, TRT calculates its share of the Comsat refund at $257,650. TRT Comments, Attachment B. US Sprint calculates its entitlement on a simple pro-rata basis at $206,824. US Sprint Comments at 2 and Attachment. Western Union uses AT&T's February 29, 1988, Comments, Attachment A, to calculate Western Union's share of the refund at $1.196 million. Western Union Further Comments at 2. Western Union asserts that Comsat should make the initial calculations, and that the Commission should then schedule informal meetings among Comsat and its carrier customers to reach agreement on the figures. *Id.*

III. DISCUSSION

11. A careful review of the record in this proceeding convinces us that the allocation methodology required here should be as simple and equitable as possible. Comsat has expressed its willingness to implement any of the methodologies and modifications thereof that have been described in this record. The Commission has directed Comsat to make lump-sum payments to its customers (both end-user customers and carrier customers); we have determined that the refund allocation should be based on Comsat's month-by-month billing records, and should adopt the calculation methodology proposed by TRT and described at para. 6, *supra*.

12. The method we are adopting eliminates questions concerning the type of service provided and the circuit counts.[19] We have decided not to adopt FTCC's method, which recombines the three Comsat entities, and the separate time periods, because we believe that to do so would further complicate, rather than simplify, Comsat's calculations.

13. The Comsat calculation should specify the dollar amount of the refund due each customer, and should calculate interest proportionately.[20] While we have decided not to follow Western Union's suggestion that the Commission sponsor meetings between Comsat and its carrier customers to determine refund amounts, we are establishing a comment period following Comsat's submission of its allocation calculations.

IV. CONCLUSION AND ORDERING CLAUSES

14. We believe that the methodology established here will allow for a simple, equitable, and rapid allocation of the refunds due. We are establishing a relatively short time frame for Comsat's submission for responses by interested parties. Because of this short response time, Comsat is also required to serve this submission upon each interested party. Further, since the matter of end user flow-throughs will be considered in a subsequent Order, we are also stating that each carrier customer receiving a share of this refund is on notice that this refund amount, with continuing accrual of interest, may have to be flowed through to end users.

15. Accordingly, IT IS ORDERED that Communications Satellite Corporation SHALL FILE not later than **July 27, 1989,** its calculations of the allocation of the previously-ordered refund amounts, including accrued interest and supporting data, as outlined herein.

16. IT IS FURTHER ORDERED that interested parties may file comments upon the Comsat filing not later than **August 11, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Memorandum Opinion and Order, 2 FCC Rcd 3706 (Com.Car.Bur. 1987) (*April 1987 Order*). For complete background on this proceeding through the present, *see* Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Memorandum Opinion and Order, 3 FCC Rcd 2643, 2644-45 (1988) (*January 1988 Order*).

[2] Comsat proposed that refunds be allocated among services based on the general type of service provided -- voice grade, international business satellite service (IBSS), full-period video, *etc.* Each multi-year circuit would receive the same per-circuit

refund as each monthly circuit in that service category. Then Comsat would determine the number of months during which each service category contributed, and the traffic projections for that service category for that number of months in the future. Comsat would then divide the refund amount per service category by the projected traffic for that category, to obtain a per-circuit refund amount applicable.

[3] Comsat noted the difficulty of implementing this proposed method for whatever portion of the refund obligation was associated with the multipurpose earth station services provided by Comsat International Communications Inc. (CICI), since these earth stations were to be sold at the end of 1987.

[4] In support of its proposal that refunds be made on a prospective basis, Comsat argued that total cash payments in excess of $20 million could impair Comsat's flexibility to develop new service offerings, maximize growth opportunities, retire debt, or pursue other appropriate financial and operating options while ensuring compliance with the provisions of the current Capitalization Plan.

[5] 3 FCC Rcd at 2646.

[6] *Id.* at 2649.

[7] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Memorandum Opinion and Order, 3 FCC Rcd 1130 (Com.Car.Bur. 1988) (*February 1988 Order*).

[8] Comsat would first calculate the amount of the refund pool attributable to each of the three entities: all revenues from August 1984 to July 1985 are attributable to Comsat World Systems Division (WSD), which provided both space and earth segment services in that period; revenues from August 1985 to December 31, 1986, would be calculated separately for Comsat Intelsat Satellite Services (ISS) for space segment, and Comsat International Communications, Inc. (CICI) for earth segment. A ratio would be developed for each customer for each Comsat entity, by comparing the amount received by that entity from that customer with the total received by that entity from all customers.

[9] Several parties submitted comments on July 31, 1987, but most of those commenters discussed matters that have since been resolved, such as whether the refund should be paid prospectively or in a lump sum. While some commenters did develop arguments regarding the flow-through requirement, which will be considered in a future Order, none discussed the issue presently before us.

[10] Comments were filed in February 1988 by American Telephone and Telegraph Company (AT&T), American Satellite Company d/b/a Contel ASC (Contel), FTC Communications, Inc. (FTCC), MCI Communications Corporation (MCI), Capital Cities/ABC, Inc., CBS Inc., and National Broadcast Company, Inc. (Networks), RCA Global Communications, Inc. (RCAGC), TRT Telecommunications Corporation (TRT), Turner Broadcasting System, Inc. (Turner), US Sprint Communications Company (Sprint), and WU World Communications Inc. and Western Union Corporation (Western Union). Reply comments were filed by AT&T, Comsat, the Department of Defense (DOD), MCI, the Networks, and RCAGC. Supplemental replies were filed by MCI and RCAGC in response to the DOD reply comments. DOD moved to strike these supplemental pleadings.

[11] The remainder of AT&T's filing describes the calculation of the amount it is owed, discussed below, and its proposed flow-through methodology.

[12] FTCC would thus avoid separating Comsat's revenues, or refund obligations, among the three Comsat entities. This would require Comsat to recombine these revenues before calculating or applying any ratio, and would treat the refund period as a whole.

[13] MCI would thus divide the WSD period, August 1984 to July 1985, into two periods -- August 1984 to December 31, 1984, and January 1, 1985, to July 1985. MCI would also divide the ISS-CICI period, August 1985 to December 31, 1986, into two periods -- August 1985 to December 31, 1985, and calendar year 1986. MCI offers no explanation or support for this suggestion. MCI further states that it appears unnecessary to calculate the excess earnings on a per-service basis.

[14] Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase III, Part 1, Memorandum Opinion and Order, 3 FCC Rcd 176 (Com.Car. Bur. 1988) (*Special Access Order*).

[15] TRT notes also that the *January 28 Order* did not set forth excess revenues in the manner which Comsat proposes for its refund calculation -- separately for three Comsat divisions -- so that customers cannot estimate the amount owed them until Comsat makes its calculation. TRT Comments at 4.

[16] Turner requests one modification in Comsat's methodology, but its request is rendered moot by a recent Bureau Order that resolves the issue. Communications Satellite Corporation, CC Docket No. 88-95, Order, 3 FCC Rcd 5748 (Com.Car.Bur. 1988).

[17] Western Union submitted comments and then added to them further comments, in view of the intervening release of the Bureau's *February 1988 Order*.

[18] Comsat also expresses its willingness to comply with the Western Union suggestion of informal meetings between Comsat and its customers to review the Comsat calculations, should the Commission so desire.

[19] The Turner request, as noted above, has already been resolved.

[20] As discussed in the *January 28 Order*, interest will be calculated according to the interest rates established by the Internal Revenue Service for the time periods in question. *See January 28 Order*, 3 FCC Rcd at 2644, 2648 and Appendix C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CHANNEL 15/ OMAHA Omaha, Nebraska	**BC DOCKET NO. 80-693** File No. BPCT-790409KE
MID-AMERICA BROADCASTING, INC. Omaha, Nebraska	**BC DOCKET NO. 80-694** File No. BPCT-791026KN
KOPLAR COMMUNICATIONS, INC. Omaha, Nebraska	**BC DOCKET NO. 80-695** File No. BPCT-790703KF
FAMILY TELEVISION, INC. Omaha, Nebraska	**BC DOCKET NO. 80-696** File No. BPCT-790627KE

ERRATUM

Released: March 17, 1989

The Order appearing at 2 FCC Rcd 37 (1987) was inadvertently printed in the FCC Record. No Public Notice was ever released concerning such an action and it is totally without force or effect. According to the official records of the Agenda Branch, Office of the Secretary, Office of Managing Director, FCC 86-557, assigned to the Order printed at 2 FCC Rcd 37, has been cancelled. No action has been taken by the Commission with respect to FCC 86-557.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 20, 1989

Commissioner Patricia Diaz Dennis releases separate statement in an Order, FCC 88-427, released January 25, 1989, 4 FCC Rcd 1148.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as Amended.

I respectfully dissent from that portion of the Commission's action granting a five-year amortization to GTE North Missouri for the reasons stated in my dissent in CC Docket No. 87-447, 3 FCC Rcd 984 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 20, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Memorandum Opinion and Order, FCC 89-69, released May 1, 1989, 4 FCC Rcd 3874.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Technical Compatibility Protocol Standards for Equipment Operating in the 800 MHz Public Safety Bands.

I support a Further Notice of Inquiry on setting standards for future technologies in the public safety arena. Trunking standards for public safety radio systems may well be desirable in the abstract. However, the public safety community's pressing need for new spectrum, the extensive period of time that would likely have been required to develop such standards, and the fact that the current generation of public safety radio equipment will be among the last to use analog transmission, all militated against such action. Public and private resources today are better spent focusing on whether Commission promulgation of a *digital* transmission standard is in the public interest.

The next generation of public safety radios will use digital transmission technology that holds great promise for increased spectrum efficiency. Standards could speed introduction of this new technology and result in increased efficiency. Standards could also enhance interoperability between different segments of the public safety community and foster competition in the public safety radio market. If the FCC's setting digital transmission standards would further these ends, I would not hesitate to take such action. For this reason, I look forward to the parties' comments in the Further Notice of Inquiry.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORP.
Complainant,

v. File No. E-89-166
E-89-167

CINCINNATI BELL TELEPHONE COMPANY
SOUTHERN NEW ENGLAND TELEPHONE
Defendants.

ORDER

Adopted: June 19, 1989; Released: June 28, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a motion filed on June 13, 1989, by Litel Telecommunications Corp. (Litel) requesting that we dismiss without prejudice the above-captioned proceedings. These proceedings were initiated by formal complaints filed by Litel on May 5, 1989, alleging violations of Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202. Defendants have advised the Enforcement Division that they do not object to the motion.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Motion to Dismiss filed by the complainant IS GRANTED.

3. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-363

In re Applications of

AUGUSTA RADIO FELLOWSHIP INSTITUTE, INC. d/b/a GEORGIA RADIO FELLOWSHIP — File No. BPED-870820MA

MARSHALL WILLIAM ROWLAND, JR. — File No. BPH-87082OMG

RIVERS BROADCASTING INC. — File No. BPH-87082OMW

For Construction Permit
for a New FM Station on Channel 279A
in Leesburg, Georgia

Appearances

Gary S. Smithwick on behalf of Marshall William Rowland, Jr.; *Stephen C. Simpson*, on behalf of Augusta Radio Fellowship Institute, Inc., d/b/a Georgia Radio Fellowship; *Nathaniel F. Emmons* on behalf of Rivers Broadcasting, Inc.; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: June 19, 1989; Released: June 29, 1989

PRELIMINARY STATEMENT

1. This is a ruling on a proposed universal settlement under a Joint Request For Approval Of Agreements And Petition For Leave To Amend filed on June 1, 1989, by the remaining applicant-parties:[1] Marshall William Rowland, Jr. ("Rowland"), Rivers Broadcasting, Inc. ("Rivers") and Augusta Radio Fellowship Institute, Inc. d/b/a Georgia Radio Fellowship ("Fellowship"). There also is a related amendment with respect to a change in transmitter site and a submission in the nature of a motion for summary decision on a basic qualifying issue cited in another case against Rowland the proposed winner here. Since the nature of the relief sought requires findings of fact and conclusions of law, the pleadings will be treated as a motion for summary decision under the Commission's rules. The Bureau filed its Comments with respect to the settlement, amendment, and qualifying issue on June 12, 1989.

The Payoffs

2. The settlement contemplates that Fellowship and Rivers shall dismiss their applications with prejudice and that Rowland shall receive the grant. In return, Rowland will pay Fellowship the sum of $15,000, and Rowland will pay Rivers the sum of $200,000. The payments are to be made pursuant to certain prescribed escrow arrangements which are not the subject of this ruling.[2]

The New Tower Site

3. Rowland submits as Attachment 6 to the settlement, a proposed engineering amendment to Form 301 to relocate Rowland's antenna site to an existing tower in Palmyra, Georgia. Rowland discloses that the Palmyra tower supports several existing transceivers and its utilization will more quickly put the station on-the-air and will increase listener coverage. The efficiencies to be accomplished are self-evident: Rowland can more quickly put the new station on the air and begin serving the citizens of the service area more quickly by mounting the antenna site on an existing tower rather than constructing a new tower as originally planned.

FINDINGS OF FACT

The Disqualifying Issue

Rowland's Qualifications

4. There were no issues designated or added in this proceeding against Rowland. However, an issue had been designated against Rowland in a proceeding for a new FM station at Solana, Florida (MM Docket No. 87-464):

> A. To determine the facts and circumstances surrounding the certification of Marshall W. Rowland, Jr.'s application and in light of that certification, the facts and circumstances that led to the untruthful representation that he had sought FAA approval of his tower site.
>
> B. To determine whether those facts and circumstances should disqualify Marshall W. Rowland, Jr.

The designation of that issue was duly reported by Rowland in his application on February 26, 1988.

5. In paragraphs 2 and 9 of the *Hearing Designation Order* in this case, *supra*, the Commission stated:

> In the event a construction permit is awarded to Rowland as a result of this proceeding, its grant shall be without prejudice to: (1) whatever action, if any, the Commission may deem appropriate as a result of the issue designated against Rowland in the proceeding for new FM service in Solana, Florida, should that proceeding remain unresolved; (ii) and otherwise subject to the outcome in *105.3 Ltd., et al.*, MM Docket No. 87-464.

The Solana proceeding was terminated pursuant to a settlement agreement whereby Rowland dismissed his application.[3] *See Memorandum, Opinion and Order*, FCC 89M-1159, released April 13, 1989. Since the Solana issue

remains unresolved, it must be addressed before this settlement can be approved. *See Hearing Designation Order, supra.*

6. A record was developed in the Solana proceeding which demonstrates that Rowland did not intentionally make an untruthful representation. Attachments to the settlement represent copies of the evidence offered in the Solana proceeding together with live testimony of Rowland during which he was cross-examined about the matter. Rowland submits proposed findings of fact and conclusions of law on the Solana issue in connection with the settlement here.

Findings of Fact in The Solana Case

7. The Solana proceeding (MM Docket No. 87-464) was designated for hearing by *Hearing Designation Order*, DA 87-1488, released November 4, 1987. *See Central Radio Communications, Inc., et al.*, 2 F.C.C. Rcd 6742 (1987). Eleven applications including Rowland's were designated for hearing.

8. By *Memorandum Opinion & Order*, FCC 88M-207, released January 28, 1988, the issues set forth in Paragraph 4 above were added against Rowland in the Solana proceeding:

9. The technical portion of Rowland's application as originally filed was prepared and certified by his consulting engineer, Peter V. Gureckis. Rowland Exhibit 1, ¶ 1. In response to question 3, Section V-G thereof, Mr. Gureckis indicated that the Atlanta, Georgia office of the FAA had been notified of Rowland's proposed construction on August 21, 1986. *Id.* at ¶ 1.

10. A review of the record excerpts that were submitted by Rowland indicates that the representation was made by Rowland's agent, the engineer, without any intent to deceive the Commission. It was reasonable on Mr. Rowland's part to rely on the competence and expertise of the engineer who had previously well-served Mr. Rowland in the same capacity, although not to the extent of omitting to verify the true facts before certifying and filing. But there was no apparent motive to deceive the FAA or the Commission by misrepresenting the fact of the engineer's failure to have notified the FAA, since the result would have been the designation of an air-hazard issue which, if not met, would have led to Rowland's disqualification. Thus, there was no rational motive for Rowland (or his agent) to consciously fail to initiate the air hazard clearance process since an unresolved air hazard issue is disqualifying.

11. More specifically, in August 1986, Rowland filed his application in Solana. In March 1987, Mr. Rowland placed a telephone call to the FAA's Atlanta office to determine the status of the air safety determination. The FAA advised that a necessary form (Form 7460-1) had not been submitted. Mr. Rowland and his engineer, Mr. Gureckis, checked their files and they were unable to locate the form, or a copy. Thereupon, Messrs. Rowland and Gureckis concluded that through oversight there had been a failure to submit the form to FAA.

12. Rowland then hired an aeronautical consultant who determined that FAA would approve only a tower with a height of 120 feet which would be too low for transmission. Thus, a search was begun for a new site. One was located and on April 3, 1987, Rowland asked FAA for clearance. An engineering amendment for a new site was filed on April 17, 1987, and FAA issued a determination of no hazard to air navigation for the new site.

13. The facts disclose that Mr. Gureckis had in the past performed engineering services for Rowland in a competent manner. As a result of such favorable experience, Rowland relied on Gureckis to follow through with FAA and to accurately complete that portion of the application pertaining to the status of the FAA's air hazard determination. Gureckis testified that the disclosure error was due to his inaction and that Mr. Rowland played no role in the erroneous disclosure.

14. The facts further disclose that Rowland read the certification of Gureckis as to the accuracy of the technical data to mean that Rowland did not need to make an independent verification in order to justify his own certification. In that regard, it is noted that Rowland is experienced in broadcast matters, including the Commission's application process.

CONCLUSIONS OF LAW

15. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations of denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Rowland has the burden of establishing that summary decision would be appropriate based on his papers. *See Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, Rowland is found to have sustained this burden.

16. In order for there to be a finding of a disqualifying certification misrepresentation, there must be a finding of an intent on Rowland's part to deceive. *See Armando Garcia*, 3 F.C.C. Rcd 1065 (Review Bd 1988). In that case the Review Board held that

> - - - with respect to allegations that Garcia falsely certified his application, it is well-established that an intent to deceive must be demonstrated to support a misrepresentation issue.

Id. at 1067. The Commission has held that a finding of misrepresentation must be supported by substantial evidence of an "intent to deceive" which is the " *sine qua non* of any prospective misrepresentation issue." *See Riverside Broadcasting Company, Inc.*, _____ F.C.C. 2d _____, *Slip Op.* FCC 86-236, released May 14, 1986. Here, the evidence would not support a finding that there was any intent on Rowland's part to deceive the Commission. In this case, Rowland's prime interest was to qualify as an applicant with respect to his tower site. He hired an engineering consultant to obtain the necessary FAA clearance. The cost to Rowland for an engineer to falsely certify would probably be greater than would the cost for an engineer to perform a routine professional service. Also, no rational engineer having no equitable stake in

the application and who intends to continue to do business with the Commission would certify falsely to an FAA clearance.

17. Further, neither the applicant nor the engineer would have any motive to deceive the Commission on FAA clearance. If Rowland is declared the winner he will one day need to construct and he would never be able to construct on a site for which FAA clearance had not been obtained. Certainly the engineer would have no motive to have his name ascribed to a tower site which would one day be exposed as uncertified due to the engineer's misfeasance. If construction went forward under those circumstances, the engineer could be faced with the potential of a substantial lawsuit as well as the loss of his professional credibility. Thus, the only conclusions that the evidence supports is one of negligence on the part of Gureckis in not following through with the FAA and for certifying that he had obtained clearance, and further negligence on Rowland's part for not verifying that FAA clearance was in hand before he certified. Rowland's carelessness and ignorance of the law are not excuses for failing to adequately supervise his agent and for submitting an application that was incorrect in these material respects. *Compare Gary D. Turrell*, 102 F.C.C. 2d 787, 790 (Review Bd 1985). But Rowland's mere carelessness would not support a finding of intent to deceive.

18. It is also a significant circumstance that Rowland voluntarily disclosed the FAA lapse. Voluntary disclosure militates against finding an act of deliberate misrepresentation. *Omaha TV, Inc.*, 102 F.C.C. 2d 875, 886 (Review Bd 1985). The fact that Rowland relied on an engineer who had previously performed competently is another factor in support of a finding here that there was no intent to deceive. *See* and *compare Broadcast Associates of Colorado*, 104 F.C.C. 2d 16, 19 (Comm'n 1986) (disqualification is unwarranted for improper certification and inaccurate deposition testimony when applicant acted on counsel's advice). The evidence as a whole negates the existence of any material fact requiring litigation on the issue of misrepresentation. It is noted that the Bureau agrees that based on the evidence Rowland's disqualification is not warranted. *See* Bureau Comments, *supra* at 2. Accordingly, the disqualifying issue will be resolved in Rowland's favor.

19. Rowland has also made the proper showing under the Commission's rules for accepting an engineering amendment in the context of a settlement. 47 C.F.R. §73.3522(b)(i)(ii). *See also Simon Geller*, 90 F.C.C. 2d 250 (Comm'n 1982). Rowland's amendment would facilitate bringing a broadcast service to Leesburg and would terminate this proceeding. The Bureau also concurs in accepting the amendment and notes that the engineering amendment is in accord with the Commission's technical requirements.

Settlement

20. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

21. In this case, with the disqualifying issue resolved in its favor, Rowland is qualified at this time to construct and operate a TV station. The Joint Request was filed timely in accordance with §73.3525. The parties have represented that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Also, the Bureau has no objection to approving the settlement. *See* Bureau's Comments *supra* at 1-2. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules.

22. There also has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Leesburg, Georgia at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

RULINGS

IT IS ORDERED that the mispresentation issue added against Marshall William Rowland, Jr. in the Solana, Florida proceeding (MM Docket No. 87-464) IS RESOLVED by summary decision in favor of the applicant.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Agreements And Petition For Leave To Amend filed on June 1, 1989, ARE GRANTED and the Settlement and the Amendment ARE ACCEPTED.

IT IS FURTHER ORDERED that the application of August Radio Fellowship Institute, Inc. d/b/a Georgia Radio Fellowship (File No. BPED-870820MA) and the application of Rivers Broadcasting, Inc. (File No. BPH-870820MW) ARE DISMISSED with prejudice.

IT IS FURTHER ORDERED that unless an appeal from the Summary Decision is taken to the Commission, or unless the Commission reviews this Summary Decision on its own motion in accordance with 47 C.F.R. §1.276 of the Commission's rules, the application of Marshall W. Rowland, Jr. (File No. BPH-870820MG) to construct and operate a new FM Station on Channel 279A at Leesburg, Georgia IS GRANTED and this proceeding IS TERMINATED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] This case started as a 5 party case. *See Hearing Designation Order*, DA88-1088, released August 15, 1988, published at 53 Fed. Reg. 32,658 (August 26, 1988), and reported at 3 F.C.C. Rcd 4932 (1988). Joy FM Limited Partnership, a Sonrise sponsored applicant, was dismissed on April 13, 1989, for the failure of one of its counsel to participate in duly noticed depositions. *See Memorandum Opinion and Order*, FCC 89M-1198, released April 17, 1989. The application of Goldwing Broadcasting Company was dismissed for a failure to prosecute. *See Order*, FCC 89M-1228, released April 20, 1989.

[2] The Commission does not assume jurisdiction in contractual controversies involving broadcast licensees, *inter se*, recognizing that such matters are private in nature and generally are more appropriate for resolution by courts of local jurisdiction. *See Don H. Martin, Jr., et al.*, 4 F.C.C. Rcd 2707 (Review Bd 1989).

[3] Rowland timely reported this to the Commission. *See Order*, FCC 89M-1534, released May 26, 1989.

[4] This **Summary Decision** disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-305

In re Application of

SHIRLEY MARCHANT File No. BPH-870429MD

For Construction Permit for a
New FM Station, Channel 298A,
at Omega, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1989; Released: June 29, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 89M-1212, released April 19, 1989, Administrative Law Judge Joseph Stirmer (ALJ) dismissed the application of Omega FM Limited Partnership (Omega) in the captioned proceeding.[1] Because no basic qualifying issue had been specified or sought with respect to the remaining application of Shirley Marchant (Marchant), and Marchant had been found to be basically qualified in the *Hearing Designation Order*, 3 FCC Rcd 4061 (1988)(HDO), released in this proceeding on June 10, 1988, the ALJ granted the Marchant application.

2. However, on May 19, 1989, the Commission's Mass Media Bureau (Bureau), while conceding that its notice of appeal was not timely filed pursuant to Section 1.302 of the Commission's Rules, 47 C.F.R. §1.302, filed a Motion to Accept Late-Filed Notice of Appeal, Notice of Appeal, and Appeal, alleging that Marchant "does not now have, nor did she ever have, reasonable assurance of the availability of the transmitter site specified in her application" (Appeal at 1). Based thereon, the Bureau requests that the Board reopen the record and add appropriate issues.

3. In support of its motion, the Bureau claims that it did not receive "relevant information" until May 17, 1989.[2] More specifically, the Bureau claims that Marchant's application contained a certification that she had "reasonable assurance" of a proposed transmitter site (an existing tower owned by the Plant Telephone Company in Omega, Georgia); and, according to Marchant's certification, she had contacted one Danny Sterling to obtain this "reasonable assurance." However, the Bureau represents that (Appeal at para. 3):

> On May 17, 1989, counsel for the Mass Media Bureau received information from Rebecca McClellan, a principal of Omega FM Limited Partnership, that indicated that Marchant did not have reasonable assurance of the site specified in her application. Immediately thereafter counsel for the Bureau spoke on the telephone with Danny Sterling. Sterling confirmed that Marchant had spoken to him about placing her antenna on the Plant Telephone Company's tower. As the attached "Declaration" of Danny Sterling makes clear, he did not give Marchant any assurance that she could use the tower for her proposed transmitting antenna prior to the time she certified to the availability of the site.

4. In pertinent part, the Sterling "Declaration" states (Appeal, Attachment at 2; emphases added):

> I am a vice president of the Plant Telephone Company in Omega, Georgia. *I am also a principal of Omega FM Limited Partnership*, which filed an application for a new FM station at Omega, Georgia on April 30, 1987. Sometime before April 30, 1987, Shirley Marchant came to my business office and told me that she was filing an application for a new FM station at Omega. Marchant asked me if she could use a 310-foot tower owned by the Plant Telephone Company for her transmitter. I told her that other antennas were on the tower and that a cellular antenna may be added in the future. I also told her that I did not know if the tower could support an FM transmitter [sic]. Marchant then asked me if she could specify the tower in the application she was going to file with the FCC. *I told her that she "could do whatever you wanted to do." However, I never gave Marchant permission to use the company's tower.*
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> I am aware that Marchant filed an application for a new station at Omega and that she specified the company's tower in the engineering portion of her application . . . . Marchant called me sometime in 1988 and asked me if I would sign a statement agreeing to let her use the company's tower for her FM transmitter. I told her that I would not do so.

5. In her Opposition (filed June 6, 1989), Marchant argues that: (1) the Bureau's Appeal is untimely; (2) since Omega must have known of the purported lack of Marchant's "reasonable assurance" for her proposed tower for over two years during the pendancy of this proceeding, its failure to timely raise the matter (only after it was dismissed from the proceeding did it use the offices of the Bureau to raise the issue) is no more than a ploy; (3) Omega had offered Marchant in excess of $200,000 to settle this proceeding shortly after the case was designated for hearing, yet Omega did not attempt to timely raise the "reasonable assurance" issue which could have lead to the disqualification of Marchant; (4) Marchant's interpretation of the statements made during her visit with Danny Sterling demonstrates that she had "reasonable assurance" of the telephone company site; (5) the statements made during this visit are corroborated by a witness who accompanied Marchant (Martha Bryan); and (6) the telephone company fully cooperated with Marchant's consulting engineer (Robert L. Purcell) when that engineer subsequently consulted with the telephone company to correct an error in site coordinates.[3]

6. As noted, the Bureau has requested that the Board reopen the record in this proceeding and add appropriate issues to inquire into Marchant's site availability. It is well established that:

> A petition to reopen the record must be supported by newly-discovered evidence; that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and that the new evidence would, if true, affect the decision.

The News-Sun Broadcasting Co., 27 FCC 2d 61, 62 (1971); *Kaye-Smith Enterprises*, 98 FCC 2d 675, 686 (Rev.Bd. 1984).

7. Here, had the now-dismissed applicant (Omega) filed the Appeal at issue, it would have patently failed the "due diligence" requirement of the foregoing record-reopening test. Indeed, the principal of the telephone company relied upon for Marchant's "reasonable assurance" was also a principal of Omega. Thus, had Omega waited for over two years (and until it was dismissed from the proceeding) to make the claim that Marchant lacked "reasonable assurance," it would be grossly untimely. Indeed, "it is impermissible for an applicant to 'sit back and hope that the decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.' *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C.Cir. 1941)." *Kaye-Smith Enterprises*, *supra*, at 686.

8. Nevertheless, the Bureau has timely (within two days of receiving pertinent information) raised substantial and material questions of fact concerning a basic qualification aspect of Marchant's application. Thus, even where vital information is supplied after the close of a record, the Board has reopened and remanded for further hearing cases where a grant has already been made. *Linda Crook*, 3 FCC Rcd 1867 (Rev. Bd. 1988)(Board remands for financial issue after its decision granting single applicant). Section 308 of the Communications Act, 47 U.S.C. §308, demands that an applicant be technically qualified. As the Board has reiterated in two recent proceedings, *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771-1772 (Rev. Bd. 1989), and *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2534-2535 (Rev. Bd. 1989), an applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site at the time it files its application. As the Commission itself declared in its *Order* (*In the Matter of Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications)*, 58 RR 2d 776, 782 (1985)(emphases added; footnote omitted):

> The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. *A mere possibility that a site will be available is not sufficient. William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). *Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.*

See also Dutchess Communications Corp., 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985).

9. Albeit a close question here, we simply cannot determine on the basis of the pleadings before us whether Marchant possessed the requisite "reasonable assurance" of her proposed transmitter site, in good faith, at the time she filed her application. It is axiomatic, as the Court has reiterated, that where "significant and material disputes of fact remain to be resolved" the Commission "shall formally designate [an] application for hearing. "47 U.S.C. §309(a); *see also Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59, 64-65 (D.C. Cir. 1977)." *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988). And, as the Court has monished, "the determination of which factual version is indeed accurate is precisely the function of an evidentiary hearing." *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 680 (D.C. Cir. 1985). Because of the diametrically opposed and otherwise conflicting statements presented, we have no choice but to reopen the record in this proceeding for evidentiary exploration.[4]

10. ACCORDINGLY, IT IS ORDERED, That the Motion to Accept Late-Filed Notice of Appeal filed May 19, 1989 by the Commission's Mass Media Bureau IS GRANTED, and the Appeal IS ACCEPTED; and,

11. IT IS FURTHER ORDERED, That the Appeal of the same date IS GRANTED.

12. IT IS FURTHER ORDERED, That the record in this proceeding is REOPENED and REMANDED to the Presiding Officer for the adduction of evidence and the issuance of an Initial Decision on the following issue:

> To determine whether Shirley Marchant possessed "reasonable assurance" of her proposed transmitter site, in good faith, at the time she filed her application.

13. IT IS FURTHER ORDERED, That the burden of proceeding SHALL BE on the Commission's Mass Media Bureau, and the burden of proof SHALL BE on Shirley Marchant.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The ALJ noted that Omega, which had been represented by Thomas L. Root, had "at its inception, the participation of Sonrise Management Services, Inc. Basic qualifying issues have been specified against Omega in this proceeding. "In ultimately dismissing Omega's application, the ALJ concluded (*Order*, FCC 89M-1212, *supra*, at para. 10; footnote omitted):

> In summary, Omega FM has failed to file requested information; it has failed to comply with an Order requiring production of documents; it has failed to comply with

> an Order requiring the applicant to answer interrogatories; and finally, it has failed to exchange an engineering exhibit. The combination and cumulative effect of these procedural defaults has persuaded the Presiding Judge that Omega FM has not prosecuted its application in good faith.

We observe here that Omega has not appealed its dismissal pursuant to Sections 1.302(a) and (b) of the Commission's Rules, 47 C.F.R. §§1.302(a) and (b); thus, it is no longer party to this proceeding.

[2] Had the Bureau filed its documents one day later, the Board would not have jurisdiction over this matter. *See* Section 1.302(b) of the Commission's Rules, 47 C.F.R. §1.302(b); *Silver Beehive Telephone Co.*, 31 FCC 2d 788 (Rev. Bd. 1971); *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 740 (1972). Because of the significant matters raised, even though the Bureau did not file the requisite notice of appeal specified in Section 1.302(b), the Board, pursuant to that same rule, will, on its own motion, entertain the Bureau's Appeal. *See Albert L. Crain*, 38 FCC 2d 515 (1972). In pertinent part, 47 C.F.R. §1.302(a) and (b) provide as follows:

> (a) If the presiding officer's ruling terminates a hearing proceeding, any party to the proceeding, as a matter of right, may file an appeal from that ruling within 30 days after the ruling is released.
>
> (b) Any party who desires to preserve the right to appeal shall file a notice of appeal within 10 days after the ruling is released. If a notice of appeal is not filed within 10 days, the ruling shall be effective 30 days after the ruling is released and within this period, may be reviewed by the Commission or the Review Board on its own motion.

[3] More specifically, Marchant declares (Opposition, Marchant Declaration, pps. 1-4):

> During the time I was preparing my application for the new FM station, I became aware of the fact that the Plant Telephone Company owned a tower which would be a good location for the station transmitter . . . . I went to the offices of Plant Telephone Company . . . . I asked the receptionist if Ronnie Sturdivant (Mr. Ronald H. Sturdivant) was in, who was the supervisor of the telephone company and who is a long-time friend of mine . . . . He invited me to his office. I explained to him Omega was going to have a new FM radio station, and I wanted to apply for the license. I told him I had land for a tower site, but it would be cheaper to use an existing tower if I could find one. He said he did not see any problem with my renting the tower and that they did rent space on the tower, but that Danny Sterling . . . would have to give his approval. I asked him to explain to Danny what I wanted and have Danny call me if he was interested . . . .
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> About a week later, I went to a friend's house, Martha Bryan . . . . I called Mr. Sturdivant about 4:00 p.m., and I asked him what he had heard about the tower. He told me that Mr. Sterling had been trying to get hold of me all afternoon and wanted to know if I could come to see him right away . . . . Martha and I went together . . . . I told Danny that Omega is going to have a new FM station, and that I thought his tower would be a perfect spot if he would agree to rent space on the top of it. I asked him if his tower was about 350 feet tall. He said it was not quite that tall. I asked him if there would be any problem in mounting about a 40 foot antenna on the side of the tower, and he indicated there should be no problem.
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> Mr. Sterling said that this was a really good idea to use a pre-existing tower, and did I know how much money that would save me. He said that it would be a good spot and "I don't see any problem with that." He indicated that he already had three antennas on the tower. He said that I would have to be responsible for any interference to the other antennas, but he didn't see any problem with that. I asked him if he could provide my engineer, Mr. Purcell, with the coordinates of the tower . . . .
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> I asked him what he would charge for rent, and he said he didn't know. I told him that I had been told that about $300 to $350 would be normal. He said that would be about right. As we were leaving, he said "Shirley, I want to be honest with you, I've got about that much ownership interest in the other application," indicating a small amount with his thumb and finger. Then when I started out the door, he said, "Shirley, if you decide you want to sell shares or you want a partner, be sure and remember me." He then asked me where I was planning on putting the station, and I said in Omega. He told me he was hoping I was. I asked if he would give me a letter confirming that he would make the site available, and he said he would . . . .
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> I called Mr. Sterling about a week later and asked him if the letter were ready, and he said no but he would get on it . . . . Sometime later when I did get to talk to him about putting something in writing, he said he would do it if I would sign an agreement saying that if I got the station I would not hold him to it. I told him I would rather not do that. I did not understand this to mean that I could not use the tower, but that he needed protection in the event the tower was no longer available at the time I got the station. He did not tell me that I could not use the tower; only that he would not put it in writing. My attorney advised me that a written agreement was not required but that oral assurances were sufficient. Mr. Sterling gave me his word that I could use his tower and I believed that his word was sufficient.

Martha Bryan (who was with Marchant at the Sterling meeting) states (Opposition, Bryan Declaration, p. 1; emphasis added):

> I was with Shirley [Marchant] . . . .and I went with her to see Danny Sterling regarding the use of the Plant Telephone Company tower. It is my recollection that Mr. Sterling said that he had no problem with it. He did not say that she could not use the tower.

Marchant's consulting engineer (Robert L. Purcell) declares (Opposition, Purcell Declaration, p. 1) that he called "the Plant Telephone Company in Omega, Georgia in connection with the preparation of the Marchant application. The purpose of my call was to correct an error in the coordinates which had been provided by the telephone company. When I called . . . I received nothing but cooperation from the telephone company, and I was never told that the tower site was not available.

[4] On June 16, 1989, the Bureau submitted a reply to Marchant's opposition. It there included a Declaration of Ronald Sturdivant, which claims in pertinent part (Sturdivant Declaration at 1):

> Also, contrary to Marchant's declaration, I did not tell her that the company had rented out space on the tower in the past. Finally, also contrary to Marchant's declaration, I did not tell her that Sterling was trying to get in touch with her.

Additionally, the Bureau submitted a further Declaration of Danny Sterling which avers (Bureau Reply, Sterling Declaration at paras. 3-4):

> I never attempted to contact Marchant about her proposal to rent the tower owned by the Plant Telephone Company. In fact, I did not want to discuss the matter with her because the company did not want to let her rent space on the tower. Next, Marchant did not inform me that she wanted to mount a 40-foot antenna on the side of the tower, and I never told her that it would be "no problem" to place such an antenna on the tower. Rather, I told Marchant that I was not certain that the tower could technically support any antenna that she would propose. Also, I never discussed with Marchant how much rent she would pay for use of the tower.
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> Most importantly, I never told Marchant that she could use the company's tower. Marchant, however, told me that she needed to specify an existing tower on her FCC application as the location for her FM antenna, but that, in fact, she would most likely use another site once her application was granted. Given that explanation, I agreed to Marchant's request that she could put the coordinates of the company's tower on her FCC application. As I stated in my previous declaration, I told her that she "could do whatever you wanted to do." I made it clear to her, however, that she could not in fact use the tower if her application was granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Applications of

PONTCHARTRAIN BROADCASTING COMPANY, INC. — File No. BPCT-870330KT

Louis E. Jenkins, Jr. d/b/a FLORIDA PARISHES TELEVISION LTD., a Partnership in Commendam — File No. BPCT-870421KI

For Construction Permit for a New Commercial Television Station at Hammond, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1989; Released: June 29, 1989

By the Review Board: MARINO(Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is the *Initial Decision*, 3 FCC Rcd 6800 (1988)(I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ); the Exceptions of Florida Parishes Television, Ltd. (FPTL); and a Reply thereto filed by Pontchartrain Broadcasting Company, Inc. (PBCI). Additionally, FPTL filed (on February 21, 1989) a Motion to Dismiss or to Enlarge Issues; PBCI subsequently filed an Opposition and a Supplement thereto. Having heard oral argument on June 2, 1989, and having reviewed the entire record in this proceeding to date, the Board has determined that this proceeding must be remanded to the presiding ALJ for the adduction of additional evidence and the preparation of a Supplemental Initial Decision.[1]

2. On February 21, 1989, FPTL filed a Motion to Dismiss or to Enlarge Issues, alleging on the basis of a newspaper article published in the Times-Picayune newspaper on February 4, 1989, that substantial and material questions were raised with respect to the application of PBCI. Specifically, FPTL claims that the newspaper article, which quotes PBCI shareholder Paulina Kron, raises questions concerning Kron's participation in PBCI and PBCI's financial qualifications. The newspaper article states, in pertinent part, that Kron is "one of five directors" of PBCI and that "if the corporation [PBCI] gets its construction permit, she said, it will work on getting financial backing to build the station." (FPTL Motion, Attachment at 2). In response, PBCI submitted, *inter alia*, a copy of a subsequent newspaper article, as published in that same newspaper on March 14, 1989, which states that it "reported incorrectly" that Kron is on the Board of Directors of PBCI. (PBCI Supplement to Opposition at 5). PBCI also claims that reliance on such newspaper articles is "procedurally defective."

3. While reliance on newspaper articles is not ordinarily a sufficient basis for the addition of hearing issues, *see Kaye-Smith Enterprises*, 98 FCC 2d 675, 686 (Rev. Bd. 1984), here there is ample record evidence demonstrating that there are substantial and material unresolved questions of fact which must be addressed with respect to the financial qualifications of PBCI.[2]

4. We note that the ALJ found with respect to PBCI as follows *(I.D.,* 3 FCC Rcd at 6801):

> Pontchartrain was organized by the Hammond law firm Curet & Curet. Ronald and Douglas Curet, lawyers in the firm, called four of the five stock subscribers to talk to them about applying for the station. Tr. 38, 40, 245, 313, 389. Mr. Beaver suggested Ms. Niehaus for the proposal and of the five subscribers they were the only ones who knew each other. Tr. 40, 249, 313, 394. Pontchartrain's principals stated that they were selected by the Curets because they were minority group members. Tr. 41-42, 247, 392. The Curets have assisted in preparing the application, the corporate documents, the financing (Tr. 186-88) but the applicant has never been charged for the law firm's services. Tr. 182. Keiko Niehaus, Pontchartrain's treasurer, did not know what the charge for the Curet's services would be, if any. Tr. 183. The Curet firm keeps the corporate minutes. Tr. 49. When Ms. Kron and Mr. Deiparine needed to borrow to contribute to the applicant, Ronald Curet co-signed their loans. Tr. 350, 407. Ms. Niehaus also took out a bank loan for $1,000 to meet her obligation. She said no one ever inquired about whether she could come up with $30,000. Tr. 189-90. Mr. Jackson and Mr. Dieparine also intend to borrow to make payment on their $30,000 obligations. Tr. 251, 391.
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> The bank which will lend Pontchartrain the funds needed for the station was not known to the treasurer, Ms. Niehaus, who said hesitantly she thought it was Fourth Security in Slidell. Tr. 187, 188. Mr. Jackson said it was the St. Tammany Parish Bank in Mandeville. Tr. 265. Ms. Kron said it was the St. Tammany Bank. Tr. 342. Ms. Niehaus was vague about how Pontchartrain obtained a loan letter of $5 million. She said Mr. Beaver obtained the letter but she believed it was only with Mr. Curet's help. Tr. 187. Mr. Jackson could not recall when the letter was obtained or when he saw it. Tr. 264. Ms. Kron was definite that she had no involvement in obtaining financing. Tr. 342. Mr. Deiparine was uncertain about how the letter was obtained, what the bank was, and when it was obtained. Tr. 411-18.

5. In addition to the foregoing findings of the ALJ, it was revealed at oral argument in this proceeding that counsel for PBCI could not recall (1) whether the "bank letter" purportedly issued to PBCI was obtained prior to, or after, the time PBCI filed its application (Tr. 668) (although Ms. Niehaus testified that the letter was obtained *after* PBCI filed its application, Tr. 215); (2) whether there were requirements for collateral or security contained in the "bank letter" or whether the principals

(or PBCI) acceded to any such collateral or security requirements (Tr. 668-669); and, (3) if the "bank letter" exceeded the lending limits of the institution. Indeed, the following colloquy at oral argument is enlightening (Tr. 681)[3]:

> [Board Member]: And you suggest, with a . . . cynicism that, I believe, is shared by many members of the Bar, that all that is necessary is that you come in with a piece of paper with a bank logo that says . . . five million, no problem; and I suggest that the law is not so.
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> [PBCI Counsel]: I suggest that's the way it has always been. It's a matter of proper application of Commission precedent.

6. Consistent Commission policy and precedent demand that an applicant have available sufficient net liquid assets to meet its financial commitment, and applicants must review any such documentary evidence establishing the existence of unencumbered liquid assets to assure availability of needed capital *before so certifying*. As we stated in *Las 'Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986; emphases added):

> Earlier versions of Section III of Form 301 required the submission of copies of all loan agreements with banks or individuals (setting forth loan amount, interest rate, terms of repayment, and security, if any) and the submission of balance sheets or financial statements for each person or entity except financial institutions that had agreed to furnish funds, showing all liabilities and containing current and liquid assets sufficient in amount to meet current liabilities and to satisfy the proposed broadcast commitments. *E.g.*, FCC Form 301, Section III, p.3, October 1981 ed . . . [P]resent Form 301 continues to require written documentation to support "reasonable assurance" of funds. FCC Form 301, Section III, Instruction C, January 1982 ed. The only change is that now the documentation need not be *submitted* in the application process unless requested by the Commission . . . . *The law is and remains that loan agreements and bank commitments letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 2d 1032, 1035 (Rev. Bd. 1973).

Moreover, the instructions to FCC Form 301 are clear, and provide a succinct definition of the basis required for certification (FCC Form 301, Instructions, Section III):

> An applicant for a new station must certify that it has sufficient liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

The instructions also state that, although documentation supporting certification of financial qualifications "need not be submitted with this application [such documentation] must be available to the Commission upon request." *Id.* Additionally, the certifications required by Questions 1 and 2 in Section III, FCC Form 301 are equally specific:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (*excluding bank, financial institutions, and equipment manufacturers)* have sufficient net liquid assets to meet these committments.

7. As the Board and the Commission have observed on numerous occasions, while the Commission did not require the filing of financial documentation at the time PBCI filed its application, it firmly expected applicants to have such documentation at hand at the time of certification. *Public Notice on Random Verification of Financial Certifications*, 2 FCC Rcd 2122 (1987); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *South Florida Broadcasting Co.*, 94 FCC 2d 452 (1983)("We are not, in any way, modifying the underlying substantive criteria . . . ."); *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981)(documentation supporting the attestation of financial qualifications need not be submitted with the application, but must be available to the Commission upon request). Similarly, where questions are raised as to reliance on "bank letters" (purporting to make loan proceeds available for construction and operation), the Commission has held that:

> Although the bank letters relied upon by the . . . applicants meet the reasonable assurance standard and the various banks have asserted that they were issued in good faith, it is clear that the applicants' individual qualifications were not considered by those banks. *Inquiry is needed to determine whether the bank letters were more than accommodations and were issued consistent with normal banking practices.*

Christina Communications, et al., 2 FCC Rcd 1971, 1974 (1987) (emphasis added). Here, substantial questions are raised with respect to PBCI's sources of funds; that is, who reviewed what financial documents prior to Commission certification, PBCI's financial plan, and the facts and circumstances surrounding the obtaining of the purported "bank letter." *See JAM Communications, Inc.*, FCC 89R-26, released May 2, 1989.

8. With respect to determining whether or not the "bank letter" issued to PBCI was more than an accommodation, counsel for PBCI made a rather unique claim

at oral argument that it should not be bound by the Commission's pronouncements in *Christina Communications, et al., supra*, because in that proceeding it was, in essence, the first time any such factors were considered by the Commission (Tr. 660). Long ago, in *Dutchess Communications Corp., supra*, 101 FCC 2d at 247, the Board (in determining that an applicant there did not possess "reasonable assurance" of bank financing) stated (footnote omitted; emphasis added):

> Apart from the fact that the BankEast letter was defective on its face insofar as supplying reasonable assurance of a bank loan and, unaugmented, should *not* have been credited, the circumstances giving rise to that January 1983 *letter raised inescapable doubts as to whether the BankEast missive reflected a good faith loan commitment or merely an accommodation letter written at the behest of a kinsman of a Hudson Valley principal.*

9. Finally, as recently reiterated in *Donald E. Hilgendorf*, FCC 89R-37, adopted June 2, 1989, our action here is also in keeping with the Commission's concern expressed in its *Report and Order In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, FCC 89-110, released April 20, 1989. As the Commission stated in this *Report and Order* (at paras. 15-16; emphasis added):

> Our goal in modifying Form 301 was to streamline and expedite the application process . . . . However, based upon our experience in the intervening eight years . . . we now recognize that these forms have had unintended results that are not necessarily in the public interest.
>
> As discussed in detail below, we now believe that streamlining the application process may have facilitated *the filing of applications by financially unqualified, sham and/or abusive applicants and made it more difficult to detect such applicants once they are in a comparative proceeding. By financially unqualified applicants we mean those who do not have sufficient net liquid assets on hand or committed sources of funds to construct and operate the proposed facility for three months.*

10. In light of the representations made in this proceeding, and under the financial issues we are specifying herein, PBCI will be required to document and/or demonstrate the following: (1) the originally-planned costs of construction and operation as formulated by PBCI before certifying and filing its application; (2) its financial condition, and the financial condition of each shareholder who has promised to make funds available to PBCI (including pertinent financial statements, clearly delineating liquid and non-liquid assets, as well as current and long-term liabilities), as of the date of certification; (3) the documents relied upon and reviewed by each individual who executed and certified PBCI's application; (4) the facts and circumstances surrounding the securing of the "bank letter" referenced by PBCI, including the representations and documentation available to the lending institution, and as reviewed by that institution, before issuance of the "bank letter"; (5) the "lending limit" of the financial institution relied upon; and (6) the discussions or consultations amongst the individual principals of PBCI concerning their financial qualifications and sources of funds, prior to certification.[4]

11. ACCORDINGLY, IT IS ORDERED, That this proceeding is REMANDED to the Presiding Officer for the adduction of additional evidence and preparation of a Supplemental Initial Decision on the following issues:

> (1) To determine whether Pontchartrain Broadcasting Company, Inc., is financially qualified to be a Commission licensee.
>
> (2) To determine whether Pontchartrain Broadcasting Company, Inc., falsely certified its application with respect to its financial qualifications and the effect thereof on its qualifications to be a Commission licensee.

12. IT IS FURTHER ORDERED, That the burden of proceeding SHALL BE on Florida Parishes Television Ltd., and the burden of proof SHALL BE on Pontchartrain Broadcasting Company, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] At the close of oral argument, and alerted that the Board planned to move expeditiously, the parties were afforded an additional period of time (one week) in which to continue settlement negotiations. However, on June 9, 1989, the parties advised the Board as follows: "At this time, this proceeding has not been settled. Discussions are, however, continuing. The parties hereby jointly request that the Board permit the parties to file a further statement next Friday, June 16, 1989 . . . ." The additional time was afforded the parties; however, on that date, the Board was notified that no settlement had been reached.

[2] The additional evidence adduced may raise additional "real-party-in-interest" questions. The ALJ, of course, may, if he so determines, add an appropriate issue in this regard, should the evidence so dictate.

[3] Counsel for PBCI further intimated his view that Commission precedent dictates even the acceptance of a bare "accommodation" letter (Tr. 683-684; emphasis added):

> [Board Member]: We have any number of Board cases under financial issues where we have demonstrated that, and you are familiar with them, that the bank never reviewed a principal's credit history, has never received a loan application from the principals. Have you read *Dutchess Communications* lately?
>
> [PBCI Counsel]: No, I haven't, but I will say this . . .
>
> [Board Member]: Would you like to?

* * *

[PBCI) Counsel]: And I'll say this again, the Commission has never required, until very recently, if at all, that financial qualifications depends on a -- on a showing that the bank has examined financial statements of the individuals or has received a loan application. You don't get a loan application until you're ready to apply for a loan.

[Board Member]: What we have examined is the obverse. When evidence comes our way that suggests that a bank has not, *see, e.g., Dutchess,* and kindred cases, when evidence comes our way that demonstrates that the bank has not reviewed the creditworthiness of the proposed recipients, then we add an issue. That's what we do.

[PBCI Counsel]: Well, I'll have to see that one. I don't remember any such thing, and I'll have to see it, because *-- because the Commission has never said any place that an essential requirement of financial qualifications, when you're relying upon a bank loan letter, is that the bank has examined the financial worthiness of the individuals. It has never said that.*

[Board Member]: You don't deny . . . you're not asserting here, boldy, the proposition that any letter will do, even if it is an accommodation letter?

[PBCI Counsel]: I said before you'll have to define the accommodation letter for me, because I don't -- I think it's a meaningless term . . ..

[4] Because of the questions concerning the ability of the principals to meet their loan commitments, as well as when the "bank letter" was obtained, we are also specifying a false certification issue herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-578

In re Applications of

WOODARD BROADCASTING COMPANY, INC. File No. BPH-860918MA

For Construction Permit for a New FM Station on Channel 250A in Oxford, Alabama

Appearances

M. Scott Johnson, *Lynn M. Clancy*, and *James K. Edmundson* on behalf of Woodard Broadcasting Company, Inc. and *Larry A. Miller*, on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATION LAW JUDGE EDWARD J. KUHLMANN

Issued: June 20, 1989; Released: June 29, 1989

1. This is a proceeding to determine from the following issues whether Woodard Broadcasting Company, Inc. (Woodard) is qualified to become the licensee of FM Channel 250A at Oxford, Alabama.

> To determine the facts and circumstances that resulted in Jimmy Woodard's representations in Woodard Broadcasting Company, Inc.'s amendment filed February 18, 1989.
>
> To determine, in light of those facts and circumstances whether Woodard Broadcasting Company, Inc. concealed material facts from the Commission and whether Woodard Broadcasting Company, Inc. should be disqualified.

2. This case was designated for hearing on December 16, 1987. *Hearing Designation Order*, 3 F.C.C. Rcd 236 (1988). The issues to be decided were designated on March 21, 1988. *Memorandum Opinion and Order*, FCC 88M-801, released March 23, 1988. A hearing session was held on December 8, 1988. The record was closed at the end of the session. Tr. 101; *Memorandum Opinion and Order*, FCC 88M-4148, released December 12, 1988. Proposed findings and conclusions were filed by Woodard and the Bureau on January 31, 1989. No replies were filed. Transcript corrections were to be filed 10 days after May 26, 1989 and none were filed.

FINDINGS OF FACT

3. Jimmy E. Woodard owns 85% of Woodard Broadcasting and his spouse, Geraldine S. Woodard, owns 15%. Woodard Exh. 1. Woodard Broadcasting is the licensee of WOXR(AM) at Oxford, Alabama. The Woodards also own Radio Talladega, Inc., which is the licensee of WEYY-FM, Talladega, Alabama. Woodard Exh. 4. The Woodards will, if their application is granted, sell and divest both WEYY-FM and WOXR(AM). *Id.* The Woodards first considered moving WOXR from Talladega to Oxford in late 1984. MMB Exh. 1; Tr. 18. Mr. Woodard was looking for a way to improve WOXR's financial performance and he knew that there were proposals to allocate new FM channels to Oxford and Talladega. Tr. 19-20.

4. In early 1985, he asked communications lawyer, Lauren A. Colby about the feasibility of moving WOXR to Oxford and whether he would be eligible for a daytimer preference if he applied for the FM facility to be allocated to Oxford. Tr. 23-28. Colby told him that engineering considerations would determine whether WOXR(AM) could be moved and he explained that it was not clear whether Woodard would be entitled to a daytimer preference. Tr. 26; MMB Exh. 2. Colby sent to Woodard a general memo addressed to his clients in which he explained that AM daytimers could claim a preference when "the station has been owned for at least three years by the same people . . ., and the application is for a channel which has been assigned to the daytimer's licensed community." MMB Exh. 3, at 2. When Woodard read the Colby memorandum he concluded that WOXR did not qualify for a preference. Tr. 34. On March 26, 1985, Colby wrote to Woodard and specifically explained to him that the station should not be moved to Oxford on the chance that the move would make Woodard eligible for a daytimer preference in applying for the Oxford FM. MMB Exh. 4, at 2. Colby pointed out that "it is by no means certain that you are qualified, technically, for all of terms of the 'daytime preference' enacted by FCC." *Id.* Woodard's conclusion in the face of this double warning was that he had not been told he was not entitled to the daytimer preference. Tr. 36-51.

5. On December 13, 1985, the Commission issued Woodard a construction permit to move WOXR from Talladega to Oxford. He constructed the facility and a license was issued in September 1987. Woodard Exh. 6, at 1-2. Woodard then hired a different lawyer to apply for the Oxford FM facility. That lawyer, Scott Johnson, also told Woodard that it was not clear that he was entitled to daytimer preference. Tr. 46. But he also led Woodard to believe that the policy was so uncertain that they should present their claim to the Commission for clarification and determination. Tr. 46, 50.

6. Woodard asserted during the hearing that his Talladega signal for WOXR was "listenable" in Oxford even before the station was moved to Oxford and that he had sold advertising in Oxford since 1977. Tr. 47-9. His counsel, M. Scott Johnson, said he believed that if WOXR operated in Oxford for three years, Woodard would have been eligible for the preference even though the station did not have a license for Oxford. Tr. 79-83. Johnson knew that WOXR was not licensed to Oxford for three years but he claims he did not know that it was not licensed to Oxford when Woodard applied for the Oxford FM channel. *Id.* He assumed it was licensed to Oxford and wrongfully indicated that it was in Woodard's application for the FM. *Id.* Woodard said he did not correct this

error because he considered the fact that the station operated in Oxford before a license was issued as being equivalent to being licensed. Tr. 42-4. Mr. Woodard, moreover, told two other applicants in this proceeding that he intended to claim a preference as a local daytimer even though the station had not been licensed to Oxford for three years. Tr. 51-3. Woodard Exh. 5 at 5.

7. Woodard and his counsel asserted a claim to the daytimer preference policy when they filed a petition for leave to amend on February 18, 1988. Woodard Exh. 7. The amendment was filed 30 days after designation and pledged to divest Woodard's ownership in WOXR. Woodard Exh. 7, at 3-4; Tr. 54-6, 77-8. Mr. Woodard claims that he did not include information concerning the basis for his daytimer preference because he believed that such information would be presented at the hearing. Woodard Exh. 5, at 3, Tr. 67.

CONCLUSIONS

8. On February 8, 1988, after this case was designated for hearing Woodard petitioned for leave to amend to claim that it was entitled to a daytimer preference for FM Channel 250A at Oxford, Alabama because it operated a daytime AM facility, WOXR. The amendment provided no details or support for the claim and purportedly was filed to serve notice of Woodard's divestiture pledge. If Woodard had been truthful as another applicant, Cheaha Associates, pointed out in opposing the amendment, it would have explained that the station did not meet the basic three year requirement of the Commission's policy. The Commission requires the station to have been operated for three continuous years in the same community as the FM that is being sought. *FM Channel Assignments*, 59 Radio Reg. (P & F) 1221, 1230 (1986). But no matter how the time is computed --whether it is from the date that Woodard filed its application to change the location of WOXR from Talladega to Oxford, May 29, 1985, or when it received a license for Oxford, September 29, 1987 --Woodard had not operated the station in Oxford for three years when he applied for the FM on September 18, 1986. Mr. Woodard did not provide a believable answer during the hearing about how he decided that he qualified. In fact, the whole purpose of moving WOXR to Oxford was to make application for the new FM and obtain the daytimer preference. Mr. Woodard's claim that he believed he qualified because his Talladega facility reached Oxford from Talladega is pretext for asserting a right he never had.

9. His first counsel, Lauren Colby, told him he would probably not qualify and Mr. Woodard said he knew from what Colby told him that he would not. Mr. Johnson gave him faint hope also. But instead of actually determining whether he had the right, Woodard filed an amendment and asserted the right. Johnson, who is a longtime communications lawyer, never determined the facts; he was unaware that WOXR was not licensed to Oxford when he prepared the application and apparently never determined when the station began operation in Oxford. He simply did the bidding of his client, apparently without any concern for the Commission's processes. Johnson testified that he did not give the full facts on which Woodard believed he could assert a preference in the February 8, 1988 amendment because they would be presented at the hearing. That reasoning is unsupported by any legal rationale. There is no provision in the Commission's daytimer policy for a hearing on the issue and there was no designated issue to determine if Woodard qualified. An applicant either satisfies the policy or it does not. Nor is there any reason to believe that Johnson did not know that in light of his experience.

10. After observing both Johnson and Woodard testify, there is every reason to believe that they did not want to expose their claim to a preference to scrutiny by the other parties and the Commission. At least one possible reason for withholding the facts became evident during the hearing. Knowledge of the weakness in Woodard's claim would have undermined his position in making settlements with the other parties. All of the parties have now settled with him and his proposal is no longer opposed.

11. When Woodard filed the February 18, 1988 amendment, it was responsible for providing accurate and complete information. *See* §1.65. The assertion of the daytimer preference was inaccurate and incomplete. If the full facts had been provided, Woodard could not have established good cause for its amendment. It was the opposition of another party that brought out the truth and saved the Commission from pursuing an improperly asserted preference. Both Woodard's owner, Jimmy E. Woodard, a longtime licensee, who should know how much the Commission relies on representations made by parties appearing before it, and M. Scott Johnson, who placed his client at risk by not finding out the facts and by making assertions of a daytimer preference when he apparently did not know whether the claim could be supported factually or legally, were not candid with the Commission.

12. There is sufficient evidence to conclude that Woodard engaged in a misrepresentation and carelessness in making a claim for a daytimer preference. The facts concealed were material to judging good cause for the amendment and for determining the course of the proceeding.

13. The only remaining question is whether Woodard should be disqualified from receiving a grant for a new FM station in Oxford because of its actions in withholding information in this amendment. At no time has Mr. Woodard conceded that he should have been more forthcoming; indeed, Mr. Woodard urged that WOXR should have been considered an Oxford station when it operated from Talladega. The purpose of this hearing was to make a predictive judgment about Woodard's propensity to deal honestly with the Commission and to comply with its rules and policies. *Character Qualifications*, 102 F.C.C. 2d 1179, 1211, *recon. denied*, 1 F.C.C. Rcd 421 (1986). It cannot be concluded from this single incident that Woodard should be disqualified because it cannot deal honestly with the Commission. The Bureau did not introduce evidence that the Commission has been unable to rely on Woodard in the past and no other examples arose in the course of this proceeding. But Woodard and its principals should now be aware that their failure to act honestly in this case places a burden on them to demonstrate in all future relationships with the Commission that they will act in the public interest as a trustee of the public airwaves.

ACCORDINGLY, IT IS ORDERED that the application of Woodard Broadcasting Company, Inc. (File No. BLPH-860918MA) for a construction permit for a new FM station on Channel 250A for Oxford, Alabama IS

GRANTED, provided Woodard fulfills its promise to divest its interests in WEYY-FM, Talladega, Alabama and WOXR(AM), Oxford, Alabama.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

LOUISVILLE GAS & ELECTRIC COMPANY
P.O. Box 32020
Louisville, Kentucky 40232

MW-82
File Nos. 747557, 747558, and 748913

For a Waiver of the Rules to permit mobile use of 23 GHz private operational fixed frequencies

ORDER

Adopted: June 20, 1989; Released: June 29, 1989

By the Chief, Land Mobile and Microwave Division:

I. INTRODUCTION

1. Louisville Gas & Electric Company (Louisville) seeks a waiver of Section 94.5 of the Commission's Rules, 47 C.F.R. § 94.5, to permit the use of 23 GHz Private Operational Fixed Microwave Service (OFS) frequencies by mobile stations. Louisville's proposed use is contrary to the provisions of Section 94.3 of the Rules, 47 C.F.R. § 94.3, that define an OFS station as a facility that provides radio communications service between specified fixed points. For the reasons discussed below, we are granting the requested waiver and related applications subject to the condition that the implementation of Louisville's stations may not cause interference to local OFS stations authorized for operation in the vicinity of Louisville's proposed systems.

II. BACKGROUND

2. Louisville has filed the captioned applications in the OFS microwave service requesting authorization for two new facilities with proposed locations at its Mill Creek generating station in Kosmosdale, Kentucky, and for modification of existing OFS station WNEW 621 located at its Trimble County generating plant in Bedford, Kentucky. Louisville seeks to utilize full-duplex systems that will be capable of transmitting video, audio and data communications signals. These high speed data acquisition systems will provide channelization for functions crucial to the operation of fossil generating plants including remote control of moving coal stacking and reclaiming units, and video and audio transmissions for remote indication of proper stacker/reclaimer operations. The control endpoints will be fixed, transmitting 924 kbps data and a single audio channel to the remote unit sites with a return video/audio signal from these sites to the controller. The stacker/reclaimers will transmit while in motion, but at a constant azimuth back to the controlling site.

3. In support of its waiver request, Louisville states that its proposed systems will have very small coverage areas consisting of a maximum separation between the control point and stacker/reclaimer of approximately 900 feet. Considering the low powered operation of its proposed systems[1] and the limited range of 23 GHz frequencies, Louisville maintains that interference potential from these stations would be minimal and that such operation would pose no significant threat to existing OFS systems.

III. DISCUSSION

4. In considering Louisville's request for authority to operate mobile units on frequencies allocated by Section 94.5 of the Rules for fixed use, we must determine whether a waiver of the subject rule section would frustrate the public interest policy sought to be protected.[2] The purpose for this rule section is to minimize the potential for harmful interference to fixed OFS stations that can result from mobile operations. Interference potential associated with mobile operation is inherently unpredictable because of the mobility of the station and the use of omnidirectional antennas. In the instant case, however, the movement of the mobile stations will be limited to a fixed path over a relatively small distance along a fixed azimuth. The proposed systems, moreover, are designed to utilize directional antennas transmitting at high frequencies with considerable sidelobe suppression. Under these circumstances, limited motion of the mobile transmitter should be virtually unnoticeable to local co-channel systems. In this regard, Louisville has demonstrated in its engineering analysis that the interference criteria under Section 94 of the Rules would be met at various points along the path of the stacker/reclaimers.

5. Having determined that a waiver grant would not undermine the purpose of the rule, we address whether Louisville has any alternatives within the Commission's existing rules. [3] In this regard, we note that Louisville's only alternative to mobile use of 23 GHz frequencies on a waiver basis is operation in the 6425-6525 MHz band that is shared with other services licensed under Parts 21, 74 and 78 of the Commission's Rules.[4] These frequencies, however, are allocated for mobile use only. Thus, Louisville would require a rule waiver to permit operation of its fixed control points in this band. Given the shared nature of operation in this band by several services, we conclude it is more appropriate to authorize Louisville's proposed systems in the 23 GHz band.

6. Louisville has adequately demonstrated the requisite unique circumstances and lack of any available alternative solutions under the Commission's existing rules to warrant the relief requested. Accordingly, pursuant to Sections 0.331, 1.3 and 94.33(c) of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.3 and 94.33(c), IT IS ORDERED that Louisville Gas & Electric Company's request for waiver of Section 94.5 of the Rules is granted for an indefinite term. The grant of this waiver and the associated referenced applications, however, is subject to the condition that no harmful interference shall be caused by Louisville's mobile operations.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] Louisville's maximum proposed transmitter output power is 20 mW or 13 dbm with an effective isotropic radiated power of 71 W or 48.5 dbm.

[2] *See* 47 C.F.R. §§ 1.3, 94.33(c); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969); Thomas Radio v. FCC, 716 F.2d 921 (D.C. Cir. 1983).

[3] *Id.*

[4] 47 C.F.R. § 94.61(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-2 File No. 10008-CL-P-317-A-88

For a construction permit to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Alaska 3--Haines Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1989; Released: June 28, 1989

By the Chief, Common Carrier Bureau:

1. Progressive Cellular III B-2 (Progressive) won the non-wireline lottery for the Alaska 3--Haines Rural Service Area (RSA). Subsequently, the Chief of the Mobile Services Division dismissed Progressive's application as unacceptable for filing because it did not have a firm financial commitment as required by Section 22.917 of the Commission's Rules. Progressive has filed a Petition for Reconsideration and Reinstatement in which it seeks reinstatement of the above-captioned application. No opposition pleadings have been filed.

I. BACKGROUND

2. In its initial application filed on July 15, 1988, Progressive relied upon a financial commitment letter from Brad Peery Inc. (Peery) to meet its construction and first-year operating costs. The letter from Peery is dated July 6, 1988, and describes Peery as "an investment banking firm specializing in the telecommunications industry." The letter states that Peery will fund Progressive's cellular enterprise up to $2,000,000 over a period of five years if Progressive, which is currently a general partnership, meets the following conditions: (1) incorporates itself in such a manner that Progressive will have "100 per cent voting control" of the company which will own and operate the RSA system; (2) obtains equipment vendor financing up to $1,500,000; and (3) obtains any capital in addition to the vendor financing by selling non-voting common stock. Progressive estimated that its construction and first-year operating costs would total $1,053,000.

3. By letter dated October 25, 1988, the Chief of the Mobile Services Division (MSD) found Progressive's application to be unacceptable for filing pursuant to Section 22.20 of the Rules, on the grounds that Progressive did not have a firm financial commitment as required by Section 22.917(c) of the Rules. The letter determined that the application was defective because Progressive is a partnership and the financial commitment letter was contingent upon Progressive forming a corporation. The letter noted that if Progressive were to become a corporation, it would violate Section 22.922 of the Commission's Rules. In this regard, Section 22.922 prohibits the transfer or assignment of any cellular application prior to the grant of a construction authorization. Thus, the MSD letter concluded that Progressive did not have a firm financial commitment.[1]

4. Progressive filed an amendment to its application on October 27, 1988, by which it claims to "update" the firm financial commitment provided to Progressive by Peery, as well as its budgetary estimates. The amendment includes a financial commitment letter from Motorola, Inc. dated October 14, 1988, by which Motorola promises to provide up to $1,137,500 for Progressive's construction and first-year operating costs. Progressive notes that, as indicated in the Peery commitment letter, the provision of vendor financing was contemplated. Further, Progressive claims that Motorola had been the intended vendor. Progressive observes that the Motorola commitment clearly exceeds Progressive's currently projected construction and operating costs, which Progressive now estimates to be $1,114,000. The amendment also includes a letter from Peery dated October 14, 1988, by which Peery states that all the terms of its initial financial commitment letter to Progressive had been satisfied or had been unconditionally waived in light of the provision of vendor financing by Motorola sufficient to cover Progressive's construction and first-year operating costs. In light of the foregoing, Progressive states, it does not intend to incorporate itself. Progressive also explains that the incorporation condition of the original Peery letter envisioned long-term capitalization beyond the first year of operations.

II. PROGRESSIVE'S CONTENTIONS

5. On November 22, 1988, Progressive filed its Petition for Reconsideration and Reinstatement, in which it seeks to have its application reinstated on the grounds that its initial application was acceptable for filing. Progressive asserts that since the Peery commitment letter stated that financing was contingent upon Progressive obtaining a construction permit, the incorporation condition of the commitment letter did not require Progressive to incorporate itself prior to receiving a construction permit. Thus, Progressive claims, the incorporation condition did not violate Section 22.922 of the Commission's Rules, which prohibits the assignment of a cellular application prior to the grant of a construction permit.[2] Progressive argues that since the Peery financial commitment was not conditioned upon any violations of Section 22.922 of the Rules, the financial commitment is not defective pursuant to Section 22.917 of the Rules. Further, Progressive notes, the incorporation requirement has been waived unconditionally as explained in Peery's October 14, 1988 letter.

III. DISCUSSION

6. Section 22.917(c) of the Commission's Rules provides that if a non-wireline applicant for a new cellular radio system designed to serve a Rural Service Area (RSA) relies upon a firm financial commitment from a source other than itself, that commitment must be submitted as part of the initial application and the commitment must be sufficient to cover the realistic and prudent estimated costs of constructing and operating the system for one

year. Progressive failed to demonstrate that it had a firm financial commitment on July 15, 1988, which was the date on which Progressive filed its initial application. The initial letter from Peery dated July 8, 1988 explained how Progressive might go about obtaining funding for its cellular system, but did not constitute a firm financial commitment. Rather, that letter clearly stated two significant conditions which Progressive had to meet in order to obtain financing; the application did not indicate that either of those conditions had been fulfilled.

7. The two conditions which Progressive had to meet before obtaining financing from Peery were: (1) Progressive had to incorporate itself in the manner prescribed by Peery and (2) Progressive had to obtain vendor financing up to $1,500,000. Although the Peery letter did not require Progressive to incorporate itself before the Commission awarded it construction authority, Section 22.917(c) of the Commission's rules requires Progressive to demonstrate its financial qualifications before the Commission can grant Progressive construction authority. In this light, the MSD's letter assumed that Progressive had to incorporate itself in order to demonstrate its financial qualifications and that this incorporation had to occur prior to Commission grant of construction authority, because an applicant is required to demonstrate its financial qualifications prior to receiving construction authority. Such a change in Progressive's ownership would run afoul of Section 22.922 of the Commission's Rules, which prohibits a cellular applicant from changing the ownership of its application prior to the grant of construction authority. Further, Progressive's initial application did not state that Progressive would incorporate itself after obtaining construction authorization. Thus, Progressive did not even commit itself to meeting Peery's first condition. Even if, for the sake of argument, the incorporation requirement were not viewed as an impediment to Progressive's ability to demonstrate its financial qualifications, Progressive's initial application did not contain a letter evidencing the availability of financing from an equipment vendor. Thus, Progressive clearly failed to meet Peery's second condition, namely, that it obtain $1,500,000 in vendor financing.[3]

8. In light of the foregoing discussion, it is clear that Progressive's initial application did not contain a firm financial commitment, as required by Section 22.917(c) of the Commission's Rules. The Commission stated the following in its *Fourth Report and Order, supra:*

> The financial showing must be included in the application. If an application that is selected first in the lottery does not include a firm financial commitment, it will be dismissed. 64 Rad.Reg.2d (P&F) 1391, 1395 at para. 16 (1988).

Progressive's October 27, 1988 amendment, which included the Motorola letter dated October 14, 1988, and Peery's letter dated October 14, 1988 (which removed the incorporation condition), did not correct a minor discrepancy in Progressive's application. That amendment replaced Progressive's previous commitment letter from Peery with a new commitment from Motorola. Therefore, the foregoing October 1988 letters cannot be used to demonstrate that Progressive had a firm financial commitment at the time it filed its application. Progressive's initial application relied completely on Peery's July 6, 1988 commitment letter to demonstrate its financial qualifications, but it failed to indicate that it had met the two conditions imposed by Peery's letter. The Commission's *Fourth Report and Order, supra*, intentionally increased the requirements relating to a non-wireline applicant's demonstration of its financial qualifications. One new requirement is that a non-wireline applicant must include a firm financial commitment from a potential lender in its initial application. Peery's letter of July 6, 1988, stated conditions which must be fulfilled in order to obtain financing for Progressive's proposed cellular system and Progressive's application did not indicate that Progressive had met those conditions. Therefore, Progressive did not include a firm financial commitment in its initial application, and the Mobile Services Division correctly dismissed Progressive's application as unacceptable for filing.

9. Accordingly, IT IS ORDERED, that the Petition for Reconsideration and Reinstatement filed November 22, 1988, by Progressive Cellular III B-2 IS DENIED and the Mobile Services Division's dismissal of the application (File No.10008-CD-P-317-A-88) of Progressive Cellular III B-2 as unacceptable for filing IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The MSD letter also observed that Progressive's application might be defective for other reasons, but in an effort to best utilize the MSD's limited resources, once an application has been found unacceptable for filing for any reason, the processing of that application ceases.

[2] The Commission issued a Public Notice, Report No. CL-89-60, on January 11, 1989, which invited comments on Progressive's petition for reconsideration and seven other petitions. Pursuant to that notice, Romulus Engineering filed Comments on February 13, 1989, which echo Progressive's foregoing argument.

[3] Even if Progressive had met the foregoing Peery conditions and were relying on Peery as the sole source of its financing, Progressive would have to submit evidence that Peery qualified as a *bona fide*, commercially acceptable source of financing, in order to demonstrate that Progressive was financially qualified. *See Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order,* 64 Rad.Reg.2d (P&F) 1391, 1398 at paras. 31-32 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, INC. (Assignor) — File No. 20308-CD-AL-01-87

and

RADIO TELEPHONE SYSTEMS, INC., (Assignee)

For Authority to Assign DPLMRS Stations in the States of Massachusetts, Maine, Vermont, New Hampshire, and Rhode Island

ORDER

Adopted: June 20, 1989; Released: June 29, 1989

By the Acting Chief, Mobile Services Division:

1. On October 24, 1988, New England Telephone and Telegraph Company, Inc. (New England) and Radio Telephone Systems, Inc. (Radio Telephone) filed a joint application, File No. 20308-CD-AL-01-87, requesting consent to the assignment of twenty one stations[1] from New England to Radio Telephone. Radio Call Company, Inc. (Radio Call), a competing paging operator, filed a petition to deny the application for assignment of Station KCA207, alleging that the station was silent for more than 90 days during 1988. On January 13, 1989, Radio Telephone filed a motion for partial grant of applications (motion) which was opposed by Radio Call.[2]

2. Radio Telephone's motion contends that, since the petition relates only to the application for assignment of one of the twenty one stations and does not relate to the qualifications of Radio Telephone or New England in general, the uncontested applications for assignment should be granted and the one station KCA207 be held in abeyance pending resolution of Radio Call's petition.

3. Radio Call opposed the motion because there was no indication that New England consented to a grant of the uncontested stations while the contested one is held in abeyance. Radio Telephone submitted a copy of New England's amendment stating that it consented to the partial grant.

4. There does not appear to be any relationship between the allegations concerning the operation of Station KCA207 and the assignment of the other twenty stations. We, therefore, find no reason to delay the grant of the remaining stations pending resolution of Radio Call's petition concerning station KCA207.

5. We find that Radio Telephone Systems, Inc. is qualified to hold the licenses involved in the captioned assignment application. We also find that approving these applications will serve the public interest, convenience, and necessity.

II. ORDERING PARAGRAPHS

6. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the Motion for Partial Grant filed by Radio Telephone Systems, Inc. IS GRANTED.

7. IT IS FURTHER ORDERED, that the Motion to Dismiss filed by Radio Call Company, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, that the Motion to Strike filed by Radio Telephone Systems, Inc. IS DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED, that assignment application File No. 20308-CD-AL-01-89, with the exception of Station KCA207, Andover, Massachusetts, filed by New England Telephone and Telegraph Company, Inc. and Radio Telephone Systems, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting, Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The application for assignment included the following station licenses.

File Number	Call Sign	Location
21553-CD-ML-04-79	KCA207	Haverhill, Massachusetts
26468-CD-ML-03-83	KCA228	Providence, Rhode Island
25209-CD-ML-01-80	KCA669	Paxton, Massachusetts
21516-CD-ML-03-80	KCA670	Springfield, Massachusetts
25061-CD-ML-01-83	KCA671	Waltham, Massachusetts
21266-CD-ML-01-79	KCB897	Portland, Maine
23280-CD-R-01-78	KCB898	Lewiston, Maine
23281-CD-R-01-78	KCB899	Manchester, Maine
21699-CD-ML-02-82	KCC261	Bangor, Maine
22342-CD-P/ML-01-85	KCC262	Rockland, Maine
23284-CD-R-02-78	KCC267	Goofstown, New Hampshire
21403-CD-ML-02-79	KCC268	Adams, Massachusetts
23285-CD-R-01-78	KCC269	Hodgdon, Maine
23286-CD-R-01-78	KCC470	Presque Isle, Maine
23287-CD-R-01-78	KCC472	Dover, New Hampshire
22721-CD-R-01-78	KCC473	Burlington, Vermont
232A8-CD-R-01-78	KCC487	Boston, Massachusetts
23289-CD-R-01-78	KCC787	Barnstable, Massachusetts
22050-CD-ML-01-82	KCC800	Brockston, Massachusetts
23291-CD-R-01-78	KCC801	Acushnet, Massachusetts
22807-CG-R-03-79	KCC793	Waltham, Massachusetts

[2] Radio Call filed a motion to dismiss Radio Telephone's motion for partial grant. Opposition and reply pleadings were filed. Radio Telephone filed a motion to strike Radio Call's reply and responsive pleadings were filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 28, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BENTON RIDGE TELEPHONE COMPANY PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On June 6, 1989, Benton Ridge Telephone Company (Benton Ridge) filed a petition for waiver of the Commission's equal access implementation requirements for independent telephone companies. According to Benton Ridge, on March 19, 1988, it received a letter from MCI Telecommunications Corporation requesting that Benton Ridge convert its facilities to equal access. Pursuant to a Commission *Report and Order* (100 FCC 2d 860 (1985)), Benton Ridge is required to complete the equal access conversion within three years of the request.

Benton Ridge states that it discussed equal access conversion with its equipment manufacturer and it was informed that the conversion costs would be about $96,000. Benton Ridge, which has 406 access lines, believes that the costs associated with the equal access conversion outweigh the benefits to its subscribers. In addition, Benton Ridge notes that it is an average schedule company and cannot increase its settlements to separately recover the costs associated with conversion. Therefore, Benton Ridge claims that its subscribers would have to absorb a large portion of the conversion costs.

Benton Ridge seeks a waiver of the Commission's equal access implementation requirements "until such time as technology is made available which greatly improves the cost/benefit ratio that currently exists." Benton Ridge suggests an alternative approach in the event that the Commission deems this waiver request not to be in the public interest. Benton Ridge's alternative request is that the Commission permit it to recover all equal access conversion costs from its interexchange carrier customers, and that the Commission specify the means of cost recovery.

Interested parties should file comments on this petition by **July 26, 1989,** and reply comments by **August 8, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CHANNEL 7, INC. File No. BMPEX-880602KG
(WSTE(TV))
Ponce, Puerto Rico

For Modification of Experimental
Broadcast Facility

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1989; Released: June 30, 1989

By the Commmission:

1. The Commission has before it for consideration: (a) the above-captioned application of Channel 7, Inc. (Channel 7) for modification of its authorization to build an experimental broadcast facility for Station WSTE(TV), Channel 7, Ponce, Puerto Rico;[1] (b) a petition to dismiss that application filed July 27, 1988, by Pegasus Broadcasting of San Juan, Inc. (Pegasus), licensee of Station WAPA-TV, San Juan, Puerto Rico; and (c) related pleadings. Also before the Commission are the following pleadings which, while filed separately, are so closely related to the subject application that we shall consider them in this proceeding: (a) a petition to terminate Channel 7's underlying experimental authorization filed on July 27, 1988, by Pegasus; (b) Channel 7's opposition to that petition; (c) Pegasus' reply to Channel 7's opposition; (d) a contingent request for special temporary authority filed February 17, 1989, by Channel 7; and (e) Pegasus' opposition to this temporary authority request.

BACKGROUND

2. Station WSTE(TV) is licensed to operate from a transmitter site on Cerro Maravilla, a mountain five miles southeast of Jayuya, Puerto Rico. Operating as licensed, Station WSTE(TV) encompasses the entire island with its predicted Grade B signal contour. The presence of mountainous terrain throughout the island, however, prevents many areas from receiving adequate service. Consequently, in November 1985, Channel 7's predecessor, Ponce Television Corporation (PTC), sought authority to construct an experimental broadcast facility utilizing three widely spaced transmitters, with circularly polarized antennas at low elevations in front of mountain peaks, all operating simultaneously on the same frequency. Such operation, it was hoped, would enable the station to bring its local service to large areas of the island previously unable to receive the signal. Specifically, PTC sought to construct three transmitters to serve Ponce and parts of the south coast (South Site transmitter), San Juan and the east end of the island (North Site transmitter), and Mayaguez, Aguadilla, and the west coast (West Site transmitter). When operating pursuant to the experimental authority, the station would cease operation from its licensed Cerro Maravilla site, although the facilities there would remain intact and in proper condition for the duration of the experiment.

3. PTC's application was opposed by 12 licensees, permittees, and applicants for television stations in Puerto Rico. After considering these oppositions, the Commission granted PTC's application on the basis that the experiment would provide information useful to an evaluation of possible methods of overcoming terrain obstructions and would provide a viewable signal to areas previously unable to receive the signal by direct means. In addition, Section 74.131(c) of the Commission's Rules, which prohibits experimental transmissions that could cause objectionable interference to regular broadcast transmissions, was waived in consideration of the potential value and the nature of the experiment. The Commission rejected as speculative the objectors' concerns that the experimental system would engender widespread service losses. The Commission found no likelihood of objectionable interference to the signals of competing licensees, and it concluded that PTC's self-interest sufficiently safeguarded against interference among its own multiple signals.

PLEADINGS OF THE PARTIES

4. *Modification Application.* Channel 7's experimental facilities became operational in February 1987, and on June 2, 1988, the licensee sought the instant modification application, arguing that performance of its experimental system could be improved by increasing the visual effective radiated power (ERP) of the West Site transmitter from 5 kW to 25 kW (a 7 dB increase) and by adding a fourth transmitter in the vicinity of Arecibo. Channel 7 maintains that the proposed changes would not adversely affect the operation of other stations in the area, but it accepts full responsibility for the elimination of any objectionable interference which might be caused to other stations. Pegasus' petition to dismiss followed on July 27, 1988.

5. In support of its petition to dismiss, Pegasus argues that Channel 7's proposal to construct a fourth transmitter is inappropriate in that its grant would in no way further the experiment and would not afford any opportunity to gather unique data that would lead to a new set of criteria governing the multiple-transmitter experiment. Further, Pegasus contends that grant of the application would result in objectionable interference within the City Grade contour of Channel 7's new Arecibo facility. With respect to the proposed increase in power at the West Site, Pegasus contends that no new experimental data could be expected, since results could be duplicated by merely adding 7 dB to data already collected. Additionally, Pegasus argues that the increases in power at the West Site would result in increased interference to the north and west of the island. Finally, the petitioner alleges that the instant application is nothing more than an attempt to add more audience, despite the fact that additional loss areas will be created. On July 29, 1988, Channel 7 made minor amendments to its proposal for a fourth transmitter, including relocating the transmitter to a site 350 meters west of the original proposal. On September 7, 1988, Pegasus supplemented its petition, arguing that Channel 7's amendment would only aggravate the situation and would in no way advance the objectives of the experiment.

6. In opposition, Channel 7 contends that Pegasus' claims are without support and without merit. The licensee maintains that the Commission envisioned the possibility in its 1986 decision that the licensee might need to modify its experimental facilities to achieve better its objective. *See Ponce Television Corporation, supra* at 1174. Moreover, Channel 7 argues that the Commission expected it to seek appropriate technical alternatives and methods to overcome any shortcomings the initial proposal would present. *Id.* at 1182. Thus, Channel 7 maintains that its proposed modifications at Arecibo and the West Site fit squarely within its contemplated experimental program. Further, the licensee contends that it is attempting to react positively to viewer comments and its own field measurements indicating that a modification would be warranted.

7. With respect to the new transmitter proposed for Arecibo, Channel 7 states that this was an area that received the station's signal prior to the commencement of the experiment, but which is now receiving service that is substantially worse than anticipated. Grant of the application, it maintains, would restore lost service. Consequently, Channel 7 contends that the modification should not be viewed as merely an attempt to increase the size of its audience. Channel 7 further argues that Pegasus' claims of interference are speculative and that additional data is needed in that regard. The licensee also contends that grant of the application would permit the accumulation of the necessary data on the field strengths delivered in that city, as well as an evaluation of the extent of co-channel interference, if any, from the various Channel 7 transmitters. Channel 7 states that operation of the proposed Arecibo transmitter would also serve to determine the sufficiency of radiation restrictions, and to assess the feasibility of allowing additional transmitters on the same channel at separations less than those currently authorized in the experiment.

8. Channel 7 further takes issue with Pegasus' contention that adding 7 dB to measurement data already collected at the West Site would be a satisfactory alternative to increasing power there. The licensee characterizes Pegasus' conclusion in this regard as simplistic and states that mere addition is not a substitute for observations of actual picture quality. Channel 7 also raises several questions with respect to the overall accuracy of Pegasus' engineering showing. First, the licensee contends that Pegasus' engineering showing erroneously relies on standard methods of predicting coverage that are useless in areas of rough terrain. Additionally, Channel 7 argues that the peculiar locations of Pegasus' measurement points cast further doubt on the accuracy of its claims. As with the Arecibo transmitter, Channel 7 asserts that an increase in power at the West Site will enable it to gather additional data on actual picture quality to determine whether the multiple-transmitter experiment is viable without causing offsetting objectionable interference.

9. In reply, Pegasus argues that, in the 1986 decision, the Commission did not foresee such significant modifications as a fourth transmitter and a substantial power increase at one of the other sites. Rather, Pegasus maintains, the Commission envisioned only refinements of testing techniques for the initial experiment. Pegasus also reiterates that Channel 7's proposal would not yield any unique information that is not contained in the measurements and results which have already been collected by Channel 7.

10. *Petition to Terminate.* Concurrently with its petition to dismiss Channel 7's application to modify its experimental facilities, Pegasus filed a separate petition seeking to terminate Channel 7's underlying experimental authorization entirely, contending that all useful experimental data had been obtained and that further experimentation was unwarranted. Pegasus specifically argued in this regard that continued experimental operation by Channel 7 would be contrary to the public interest because substantial numbers of viewers who previously were served by Channel 7's signal continue to be deprived of adequate service. Pegasus reached this conclusion by conducting its own engineering study of reception consisting of numerous field measurements at various locations throughout the island. Its study indicates substantial loss or degradation of service in the following areas of Puerto Rico: outlying areas beyond the city limits of Ponce; central portions of the island including the communities of Coabey, Utuado, and Adjunta; the southeastern coastal area, including Santa Isabel, Salinas and Coamo; and Arecibo in the north. Pegasus contends that this service loss is a direct result of an effort to concentrate service to the more densely populated cities to the detriment of a substantial number of people residing in less populated areas of the island. It estimates the number of persons losing service in these less densely populated areas to be more than 340,000. Pegasus also takes exception to various engineering procedures and assumptions employed by Channel 7 in conducting its program of research, including interference criteria used, location of measurement points, and the choice of receiving antenna used for the Television Allocation Study Organization (TASO) tests.

11. Channel 7 opposes Pegasus' petition to terminate the experiment, contending that Pegasus has failed to prove either that service losses are significant or that the experiment has achieved its objective. In regard to service losses, Channel 7 asserts that Pegasus' engineering exhibits lack detailed supporting data to validate conclusions drawn about extensive loss of service. It argues that Pegasus' measurement points were both insufficient in number and biased in their selection. Channel 7 refutes Pegasus' claim that the experimental coverage discriminates against lightly populated areas. With respect to achieving the goals of the experiment, Channel 7 argues that additional data must be gathered and analyzed before the multitransmitter approach can be fully evaluated. Channel 7 further contends that the implementation of its proposed modification will contribute to its ability to develop a practical method of overcoming terrain limitations.

12. Pegasus states in reply that Channel 7's experiment has worked exactly as expected and that the period of operation has been more than sufficient to achieve its goals. They assert that Channel 7's engineers have made extensive studies and evaluations, providing the Commission with enough information to assess the results. Finally, Pegasus contends that Channel 7 is using its proposal to modify the experiment as a delaying tactic to continue its present mode of operation and that there is nothing new to be learned from allowing implementation of its proposal.

13. *Contingent Temporary Authority.* On February 17, 1989, Channel 7 filed a contingent request for special temporary authority to continue its experimental operations. Anticipating a possible Commission finding that the initial experimental authority granted in this proceed-

ing has expired, Channel 7 seeks authority to continue its existing operations until such time as the Commission disposes of the pending modification application.[2] In support of its request, Channel 7 argues that its "present facilities and staff . . . must be maintained so that in the event the modification is granted, Channel 7 and [its] viewers will be in a position to assess the changes which such modification may bring to the quality of reception."

14. Pegasus vigorously opposes Channel 7's request, contending that the Commission envisioned a two-year experiment in its original order in this proceeding and that the two years are now passed and the experiment is over. Channel 7 has not, in petitioner's view, provided any justification for extending the experiment and there is no basis for concluding that further experimentation will generate any additional useful information or data. Pegasus refers to its petition to terminate and its reply to Channel 7's opposition to that petition as having shown the lack of need for any further experimentation and argues that this showing is reinforced by Channel 7's failure to file recent experimental data with the Commission. Pegasus infers that this failure is a result of Channel 7 having nothing of consequence to submit. Finally, Pegasus contends that the pendency of Channel 7's modification application is no basis upon which to grant further experimental authority because, even if modified, the experimental facilities can provide nothing new or useful concerning terrain shielding.

DISCUSSION

15. Preliminarily, we note that the various contentions of the parties in each of the three matters before us -- the modification application, the petition to terminate and the contingent request for special temporary authority -- have all been considered in reaching our decision. In our view, the issues and arguments raised in these proceedings which remain relevant can be subsumed in a discussion of the modification application and whether and under what conditions it should be granted.[3] Accordingly, we shall turn our attention to that application first and will not separately discuss the other matters.

16. When the Commission granted experimental authority to PTC in 1986, it expected that, upon implementation of various combinations of existing technologies (*e.g.*, precise offset, directional antennas), information could be obtained on a viable approach to overcoming terrain obstruction of television signals. In proposing the concept of simultaneously broadcasting over the same channel from multiple transmitter sites, PTC emphasized that the choice and design of each transmitting facility was made with the objective of maximizing coverage to the majority of the island, while minimizing the possibility of objectionable interference and loss of service. The Commission acknowledged then, as we do now, that some gains and losses would result from the proposed operation, but that their extent would be difficult to forecast. *Ponce Television Corporation*, *supra* at p. 1183. Pegasus now asserts, however, that the losses occasioned by Channel 7's actual experimental operation are substantial -- more than 340,000 persons -- and further contends that grant of the modifications sought by the applicant would result in even more objectionable interference than is currently experienced. Pegasus adds that no new experimental data would result from Channel 7's proposed modification. To continue Channel 7's experimental authorization, Pegasus concludes, would be contrary to the public interest. We do not agree.

17. Pegasus' allegation that no "new" experimental data will result from Channel 7's proposed modification fails to consider fully the Commission's initial objectives in authorizing the existing experimental facility. To the contrary, we believe that the addition of a fourth transmitter site, as well as the power increase at one existing site, do hold the promise of contributing valuable results to the experiment and to the development of alternate means to overcome terrain obstructions. The suggestion that the effect of the proposed West Site power increase could be duplicated simply by adding 7 dB to the existing data ignores the impact of irregular terrain and the possible existence of unusual interfering signals which may alter the effect of the power increase on coverage and interference. Consequently, mere addition is not a substitute for the information we will likely obtain from an actual increase in power.

18. With respect to Pegasus' other arguments, first, the methodology used by Pegasus in arriving at its estimate of the loss of service does not appear to be either rigorous or systematic. For example, Pegasus reports taking only a few measurements in each of a number of communities during operation of the experimental facilities. Pegasus did not follow the grid measurement approach described in Section 73.686(c) of the Commission's Rules or take sufficient numbers of measurements to determine the range of signal intensity available within these communities. Neither did Pegasus determine how much coverage existed in these communities before the experiment began. Pegasus nevertheless concludes that all of the people within these communities, more than 340,000 persons, have lost WSTE(TV) service as a result of the experiment. This conclusion is simply not warranted. Second, the modifications to its facilities which Channel 7 seeks are largely directed to improving the availability of Channel 7's signal in areas now experiencing a loss of service, such as Arecibo. Nothing in the record suggests that these remedial efforts will be unavailing. Indeed, as we note below, it is highly probable that the facilities changes Channel 7 proposes will significantly improve the overall availability of its signal. Grant of the subject modification application, therefore, would likely reduce the level of service loss now prevailing. We must reemphasize the experimental nature of the authorization at issue here. Losses and gains in service and in the technical availability of Channel 7's signal are implicit in, indeed are at the heart of, Channel 7's undertaking to evaluate its multiple-transmitter facility as a means of overcoming severe terrain restraints on signal propagation. It would make little sense, in this context, to deny Channel 7 experimental operating authority solely because inadequately supported allegations of service losses are levelled at its proposed operations.

19. Nor are we persuaded to deny authority for these facilities changes by Pegasus' assertions that the proposed modifications will increase the level of objectional interference encountered in areas of signal contour overlap among the existing and proposed transmitter facilities and that the desired-to-undesired signal ratio within the Arecibo transmitter's principal community contour will be unacceptably low. While some level of increased interference at the interfaces of the four sites' signals may occur, there is no doubt that the net effect of the requested facilities changes in terms of WSTE(TV)'s overall signal

availability will be strongly positive.[4] In any event, Pegasus' use of standard prediction methods in reaching its latest interference conclusions, notwithstanding the severe terrain involved, seriously undermines their reliability. Finally, even if some objectionable interference is created, analysis of that fact in the context of the experiment can produce a useful contribution to our knowledge in this area. Thus, it appears that grant of this modification application will advance the experiment by allowing Channel 7 to explore in a monitored environment the practical problems of overcoming reception difficulties.

20. The Commission envisioned that, during the course of the experiment, power levels and other technical aspects of the operation might need to be modified to achieve better its objective of developing an alternative broadcast system. While Pegasus maintains that any changes to the authorized experiment would have to be of a minor nature, there is no such limiting language in the Commission's decision. Further, we do not think it is wise to place constraints on the experiment that might prevent us from ascertaining the full potential of a multiple transmitter system. Rather, we believe that flexibility is paramount to a successful experiment and that Channel 7 should be given wide latitude in this endeavor.

CONCLUSION

21. In conclusion, we believe that grant of Channel 7's modification proposal would advance the goals of the authorized experiment by seeking to provide data that will help maximize service to the island and provide a more efficient use of the spectrum. Neither Pegasus' engineering exhibits indicating predicted interference to the North and West transmitter site service areas nor the accompanying field strength measurements have convinced us that this proposal would not contribute to these goals. We will, therefore, grant the modification application and afford Channel 7 continued experimental authority for a period ending six months from the date it begins operation with its modified facilities, or nine months from the release date of this order, whichever is earlier.

22. Accordingly, for the reasons stated above, IT IS ORDERED That, the above-captioned application for modification of experimental broadcast facilities filed by Channel 7, Inc., IS GRANTED, subject to the conditions imposed on the grant of the original experimental authority.[5]

23. IT IS FURTHER ORDERED That, the authority to conduct experimental operations over the facilities of Station WSTE(TV), as modified herein, SHALL EXPIRE six (6) months after the commencement of operations from the modified facilites or nine (9) months from the release date of this order, whichever is earlier.

24. IT IS FURTHER ORDERED That, the petition to dismiss the above-captioned application for modification of experimental broadcast facilities and the petition to terminate Channel 7, Inc.'s experimental authorization filed by Pegasus Broadcasting of San Juan, Inc., ARE DENIED.

25. IT IS FURTHER ORDERED That, the contingent request for special temporary authority filed by Channel 7, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The underlying authority to build the facility was granted by the Commission on October 6, 1986. *Ponce Television Corporation*, 1 FCC Rcd 1167 (1986).

[2] Channel 7 contends that its initial experimental authority is not only still in effect, but that the 24-month term of that authority specified in the Commission's order granting Channel 7's construction permit has not yet begun to run. In this regard, Channel 7 cites the language of the order to the effect that "authority to conduct experimental operations . . . shall expire 24 months after issuance of a license," 1 FCC Rcd at 1186, and notes that a license for its facilities has yet to issue. Petitioner Pegasus strongly contests this interpretation and contends that Channel 7's authorization expired on February 19, 1989, two years after Channel 7 filed its license application. We need not resolve this dispute here. For the reasons advanced in the discussion below, we have decided to grant Channel 7's application for modification and, in so doing, to set a new expiration date for the conduct of experimental operations. Our action renders moot any further debate as to the proper expiration date of Channel 7's experimental authority under our prior orders in this proceeding. *See* Section 74.112(e) of the Commission's Rules, 47 C.F.R. Section 74.112(e).

[3] Our action here disposing of the modification application clearly renders moot Channel 7's contingent request for special temporary authority and that request will, therefore, be dismissed.

[4] The possibility that the desired-to-undesired signal ratio within the proposed Arecibo transmitter's principal community contour may be lower than that encountered within the same contour of a conventional station is neither surprising nor disturbing. Channel 7's experimental broadcast operations are, by definition, not conventional in nature and rigidly conventional results are not to be expected. Further, even accepting Pegasus' engineering estimates, the Arecibo transmitter would provide a usable signal in areas which now receive no service from Channel 7 at all.

[5] Specifically, test results should be reported to the Commission in conformance with the criteria set forth in those conditions, after implementation of the changes authorized in this modification.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 8, 1989

Released: June 30, 1989

R. Clark Wadlow, Esq.
Schnader, Harrison, Segal & Lewis
1111 19th Street, N.W.
Washington, D.C. 20036

In re:
St. Louis City Communications,
Inc.
CSR-3137

Dear Mr. Wadlow:

The Commission, on its own motion, is hereby reconsidering its action of December 29, 1988 (FCC 88-426).[1]

On September 16, 1988, you filed, on behalf of your client, St. Louis City Communications, Inc. (hereinafter "SLCC"), operator of a cable television system serving a portion of St. Louis, Missouri, a petition for special relief. By this petition, SLCC seeks issuance of a tax certificate, pursuant to Section 1071 of the Internal Revenue Code of 1986, as amended, for the sale of SLCC's assets to St. Louis Tele-Communications, Inc., an affiliate of Tele-Communications, Inc. (hereinafter both "TCI"). The instant petition is unopposed.

SLCC states that it is a minority-controlled and operated company: William Johnson, a minority, owns 80 percent of SLCC's stock.[2] SLCC was incorporated on September 7, 1983, and, on May 15, 1984, entered into an agreement with Mr. Johnson and Chase Enterprises (hereinafter "Chase") to obtain $2.5 million in financing to meet closing conditions and to commence construction of the cable system. SLCC reports that it has now negotiated an agreement to sell its assets to TCI for approximately $35 million. SLCC will retire its approximately $9 million in liabilities, and seeks the requested tax certificate to enable the company, "as a continuing minority-controlled enterprise, to retain the net proceeds of the sale of its assets for the purchase of broadcast properties or cable television systems."

SLCC contends that, as start-up investors in a minority entity, both Chase and Mr. Johnson would be eligible for individual tax certificates upon disposition of their interests in SLCC, citing *Policy Statement and Notice of Proposed Rule Making in Gen. Docket No. 82-797*, 92 FCC 2d 849 (1982), and *Policy Statement on Minority Ownership of Cable Television Facilities*, 52 RR 2d 1469 (1982). In this regard, SLCC claims that in *Connection Communications Corporation*, CSR-3037, Mass Media Bur., released April 23, 1987, the Bureau issued tax certificates to all the initial investors in a minority-owned corporation, including the controlling minority shareholder who was selling its interest in the corporation. Accordingly, SLCC asserts, Commission policy would be better served by issuing a tax certificate to SLCC instead, on the gain from the sale of its assets to TCI. Chase and Mr. Johnson would thereby be able to retain their investments and profits in SLCC, and SLCC would reinvest $35 million in cable or broadcast properties controlled by Mr. Johnson. SLCC further notes that its system is surrounded by TCI systems, making TCI the system's only feasible purchaser. SLCC states that both "Chase and Johnson are committed to having SLCC reinvest the proceeds of the sale of the system in controlling interests in operating systems or stations. Thus SLCC . . . will continue as an active and effective owner/operator of cable and/or broadcast properties."

> Section 1071 of the 1986 Internal Revenue Code provides:
>
> If the sale or exchange or property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. . . .

With respect to the sale of interests held by initial investors in a minority controlled entity, the Commission's 1982 policy statement clearly stated: "Generally, to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51%." *Policy Statement and Notice of Proposed Rule Making in Gen. Docket No. 82-797*, 92 FCC 2d at 857. The Commission further explained that "[b]y so requiring remaining 51 percent minority control, we do not mean to preclude consideration of cases whereby 'minority involvement would have been significant enough' to justify the issuance of a tax certificate in the first instance [*e.g.*, limited partnerships]." *Id.* at n. 39. In this case, the controlling minority owner seeks to dispose of his interest in the corporation, and thus the remaining entity would no longer be minority controlled. Under these circumstances, we disagree with SLCC's assertion that Mr. Johnson, the controlling minority shareholder, would be entitled to a tax certificate upon disposition of his 80% controlling interest. In this regard, we note that the facts presented to the Bureau in *Connection Communications Corporation*, did not indicate that the controlling minority owner was selling its interest. It is not apparent that the Bureau would have awarded a tax certificate to the controlling minority shareholder, if it had focused on that fact. Therefore, to the extent that the Bureau's determination in *Connection Communications Corporation* may be interpreted as a departure from our 1982 policy statement, such an interpretation is incorrect. Moreover, it is clear that the Bureau has, in other instances, consistently followed our interpretation of the 1982 *Policy Statement*. *See Ben C. Fisher*, Mass Media Bur., released January 30, 1987 and *Kevin F. Reed*, Mass Media Bur., released January 13, 1986.

It is clear that if the sale of the cable system had been to an entity owned or controlled by a minority, issuance of a tax certificate would be appropriate. *See Minority Ownership of Cable Television Facilities, supra.* In this case,

though, we are asked to issue a tax certificate for a sale to TCI, a non-minority. This is clearly beyond the parameters of our current tax certificate policy. The question before us is whether it is appropriate nevertheless to issue a tax certificate to SLCC.

We believe that an extension of our tax certificate policy is not warranted in the instant case. The Commission, by its tax certificate policies, seeks to encourage the acquisition of telecommunications properties by members of minority groups. Thus, in your case, the seller of another cable system is encouraged to sell to your client because of the availability of the tax certificate. Further, your client is encouraged to sell to a member of a minority group for the same reason. If the Commission's policy is successful, therefore, two systems would be under minority control. If the departure from Commission policy you propose were adopted, at best only one cable system would be controlled by members of minority groups. Since your proposal would not serve Commission goals as effectively as the existing policy, we perceive no basis for treating minority- and nonminority-controlled entities differently for tax purposes when they sell to nonminorities.

In view of the foregoing, we find that grant of SLCC's petition is not in the public interest. Accordingly, it is ordered that the petition for special relief (CSR-3137), filed September 16, 1988, by St. Louis City Communications, Inc., IS DENIED.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

* Commmissioner Quello dissenting and issuing a statement; Commissioner Dennis issuing a separate statement.

FOOTNOTES

[1] This action was reported in a News Release, Mass Media Action Report No. MM-365, Mimeo No. 1098, dated December 30, 1988. No text, order, public notice or certificate was ever released.

[2] The remaining 20 percent of SLCC's stock, pursuant to SLCC's franchise, is owned by St. Louis Philanthropic Organization, Inc. SLCC contends that issuance of this stock was not valid. However, as part of the sale to TCI, this 20-percent stock interest will be retired.

DISSENTING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

Re: St. Louis City Communications, Inc., CSR-3137

The issue is this case is fairly complex, involving nuances of our investor tax certificate policy that are designed to assist minority ownership in broadcasting and cable. On the specific, indeed unique, facts now before us, I would grant tax certificate to St. Louis City Communications, Inc. (SLCC). In my judgment, the Commission's decision does not promote minority ownership, contravenes our policy of changing tax certificate policies on a prospective basis and is procedurally defective.

Before proceeding with the specific facts in this case it is important to review the policy goals of our minority tax certificate policy. In 1978, the Commission establishes the important objective of promoting minority ownership through the tax certificate policy. *Policy Statement: Minority Ownership of Broadcast Facilities,* 68 F.C.C.2d 979 (1978) *(1978 Minority Policy Statement).* According to that policy, a tax certificate would be granted to a broadcast licensee that transferred its facility to a minority controlled entity. The policy was designed to benefit the minority purchaser by creating an incentive for the seller, through the tax certificate, to sell to a minority.

Because the *1978 Minority Policy Statement* was too restrictive, the Commission expanded the tax certificate thereby encouraging further investment in minority enterprises and facilitating the use of tax certificates as a means of creative financing. *Policy Statement and Notice of Proposed Rulemaking,* Gen. Docket No. 82-797, 92 F.C.C.2d 849 (1982) *(1982 Minority Policy Statement).* One innovation adopted was the investor tax certificate. Investors providing "start up" financing, which allows for acquisition of the property, and investors who purchase shares within the first year after the license is issued, which allows for the stabilization of the capital base, are eligible for an investor tax certificate. *Id.* at 857. So as not to unduly restrict the alienability of their interests, the Commission stated further:

> Additionally, the **identity of the divesting shareholders, as well as the identity of those purchasing the divested shares, is not material,** because the goal behind expanding the tax certificate policy is to provide minorities opportunities to procure financing and thereby increase minority ownership of broadcast stations. (emphasis supplied)

Id. at 858. Concerning additional eligibility requirements for obtaining an investor tax certificate, the 1982 Policy Statement concluded:

> *Generally,* to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51 percent. (emphasis supplied)

Id. at 857. Emphasis should be placed on the word generally, for the Commission stated in a footnote that:

> By so requiring remaining 51 percent minority control, we do not mean to preclude consideration of cases where "minority involvement would have been significant enough" to justify the issuance of a tax certificate in the first instance. *(See* paras. 5 and 12, *supra).*

Id. at 857 n. 39. The paragraphs referenced by this footnote refer to the Commission's decision to reduce eligibility requirements for limited partnerships from 51 percent to 20 percent. The footnote also references a paragraph discussing the need for a more creative and expansive approach to the administration of tax certificates. *Id.* at 855. Therefore. as drafted, the policy statement does not

expressly preclude the type of tax certificate envisioned by SLCC.[1] It is worth noting that the concerns expressed in the *1982 Minority Policy Statement* were not limited to initial acquisition. Rather, the Commission recognized the need to establish a more stable capital base for minority enterprises. Indeed, as with any generalized statement of policy, the key question is whether a particular transaction promotes the goals that underly the policy.

All agree that the pivotal case in this proceeding is the Bureau's decision in *Connection Communications Corp.*, CSR-3038 (M.M. Bur., April 23, 1987). In that case, the Bureau granted a tax certificate to the controlling minority investor pursuant to the investor tax certificate policy. The shareholders in that case were selling their stock back to the corporation which in turn was transferring its assets and cable franchises to a third party. case were selling their stock back to the corporation which in turn was transferring its assets and cable franchises to a third party.

Relying on *Connection,* SLCC requests that the Commission grant it a similar investor tax certificate. The unique aspect of the request, however, is that the tax certificate be given to the *corporation* as opposed to the *individual* investors. Of course, the stock repurchase by the corporation in *Connection* was part of the overall sale to a non-minority third party. Thus, there appears to be little practical difference between granting a tax certificate to a controlling minority shareholder who sells his stock back to a corporation as part of an overall transfer to a third party and giving the certificate to the corporation itself. Drawing such a distinction elevates form over substance. Accordingly, I believe the teachings of *Connection* apply to the instant case. In any event, pursuant to the precedent established in *Connection,* William Johnson and Chase Enterprises, as individuals would be eligible for a tax certificate.[2]

I would grant the tax certificate to SLCC for two fundamental reasons. First. based on the rather unique circumstances of the case, I believe that minority ownership in cable television would be facilitated. Second, even assuming the majority's position regarding the *Connection case,* our policy regarding prospective changes in our tax certificate policy as well as the procedural errors in this case compel a grant.

On the facts before us, St. Louis City Communications is located in an area that is essentially surrounded by cable systems owned and operated by Tele-Communications, Inc. (TCI). Given the pattern of acquisitions in the cable industry, TCI appears to be the only logical purchaser of the system. Moreover, petitioner states the sale to TCI would settle pending litigation. In my opinion, the pending litigation regarding ownership of the system makes this case unique because the litigation affects the station's alienability. Together, these factors make the sale to an individual minority cable operator unlikely. TCI is the only realistic purchaser of the system. It does not appear that there is a viable minority purchaser for the system, a situation not likely to be replicated in other markets.

Confronted with this situation, the issue is what policy would best promote minority ownership. In the instant case, SLCC, as a corporate entity, proposes to reinvest the proceeds of the sale and acquire a *controlling* interest in another broadcast or cable facility. Such a commitment is not required by our existing tax certificate policy, which merely requires that a seller reinvest in communications properties to be eligible for a tax deferral. These investments may be passive, however, with the minority investor no longer in a controlling position. Because a condition would be placed on the certificate itself, SLCC will ultimately be in control of facilities presumably reaching larger audiences, thereby fostering the diversity goals of our minority ownership policy.

A fundamental objective of the *1982 Minority Policy Statement* was to promote "stabilization of the entity's capital base." *1982 Minority Policy Statement,* 92 F.C.C.2d at 857. Granting a tax certificate to the corporation in this case is consistent with this objective because it allows the original investors to preserve a pool of minority controlled capital. Moreover, giving the certificate to SLCC, provides a strong incentive for the noncontrolling, nonminority investor, Chase Enterprises. to remain involved in the investment.[3] In some respects, the facts before us are more compelling than cases granting certificates to individual investors, who then take the proceeds and invest in non-minority controlled media interests.

The majority disapprove the tax certificate stating that it should be given only if SLCC transferred its cable system to another minority controlled entity. They assert that if the Commission's policy is successful, two systems would be under minority control. Of course precisely the opposite occurred in this case. Given the unique facts of this case, minority purchasers were unlikely, at best. Because of the condition placed on the certificate, granting the tax certificate would guarantee the American public a larger, more significant minority controlled broadcast or cable outlet. The majority's approach gives no assurance that Mr. Johnson or Chase Enterprises will continue to invest in media facilities that are minority controlled. Thus, instead of having two minority controlled outlets, we have none. It is ironic that in the name of promoting minority ownership the Commission has adopted a policy that, at least in the context of this case, may result in a net decrease in the number of minority controlled media facilities.[4]

There is a second, independent justification for granting the tax certificate in this case. The majority now hold that the Bureau's decision in *Connection* no longer controls. Of course, the Commission is not bound by a Bureau decision. In the area of tax certificates, however, the Commission has generally followed a policy of making changes limiting application of the policy prospectively. For example, when the Commission changed its policy regarding the grant of partial tax certificates, it changed the rule prospectively. *See Policy Statement on the Issuance of Tax Certificates,* 52 R.R.2d 757, 758 (1982). This makes eminent sense. Tax considerations are an important part of media transactions. Undue hardship results if the Commission changes its tax certificate policy without fair warning. Indeed, the *1982 Minority Ownership policy* statement recognized this fact and created a procedure where parties could request declaratory rulings in order to reduce such uncertainty. *See 1982 Minority Ownership Policy,* 92 F.C.C.2d at 858 (1982).

If the Commission wishes to overrule the Connection case, then it should do so prospectively. In *Connection,* an investor tax certificate was granted to the controlling minority shareholder upon the sale of his shares. To now hold that the Bureau was unaware of the facts before it, thereby limiting the case's precedential value, is unfair in the context of our tax certificate policy.[5] It is reasonable to assume that Bureau or Commission decisions are made with full knowledge of the facts. Based on *Connection,* the

Bureau expanded the application of the investor tax certificate policy. It is worth noting that the Bureau decisions cited by the majority predate the *Connection* case and are premised on the *1978 Minority Ownership Policy and* not the investor tax certificate policy established in 1982.

Finally, I must disagree with the procedural course this case has taken. Consistent with the recommendations expressed in the *1982 Minority policy Statement,* SLCC sought a ruling from the Commission. The Commission decided to grant the tax certificate and a press release was issued. I recognize generally, press releases do not constitute official Commission action. *See Microwave Communications, Inc. v. FCC,* 514 F.2d 385 (D.C. Cir. June 27, 1974). However, unlike the *MCI* case, the issue is not merely computing time for the purpose of filing a timely appeal. Also, we are not confronted with a situations where the case turns on a difference in language between a press release and an official Commission decision. A certificate was granted. At the time of the grant, there was no opposition to the tax certificate. The only remaining action to be taken by the Commission was the ministerial act of releasing its decision and the certificate. I believe it was reasonable for SLC to rely on the Commission's grant as reported in its press release. Unfortunately, by changing its mind the majority has denied the opportunity to structure its transaction with TCI to minimize its tax consequences. Such a result hurts our minority ownership objectives by unnecessarily reducing the pool of minority controlled capital that is available for subsequent investment. Because the grant of a tax certificate would promote minority ownership in this case, the Commission should stand by its decision.

It appears we have placed the petitioners in an impossible situation. First, Section 1.108 of our rules states that: "The Commission may, on its own motion, set aside any action taken by it within 30 days from the date of *public notice* of such action." Obviously 30 days have passed since the date the Commission first approved the tax certificate. According to the majority, however, the thirty-day time period does not commence until the public notice is issued. The rule refers to § 1.4(b) for the definition of public notice, which states that public notice occurs upon the release date of the *full text of the document.* 47 C.F.R. § 1.4(h)(2). Under this interpretation, the Commission could keep the thirty-day time period from running by simply not releasing the document. The majority's construction of § 1.108 would keep parties in administrative limbo for years.[6] Under this scenario, interested parties have no idea what is being reconsidered because they have no chance to review a released document. A more appropriate reading of § 1.108 would be that public notice is a condition precedent to *sua sponte* review by the Commission. Such an approach provides interested parties with an opportunity to examine the initial decision and perhaps comment on it. Under this interpretation, the majority would be precluded from engaging in a *sua sponte* reconsideration until it released a decision. This construction is more consistent with the goals of administrative fairness.

In summary, I believe minority ownership would be enhanced by granting a tax certificate in the instant case. We have done a great disservice to SLCC. Under the majority's approach, we have no assurance that the parties in this case will invest in media entities that are minority controlled. In a broader sense, we have also hurt existing minority owners by creating a disincentive for minorities to invest in their own facilities. Accordingly, I dissent.

FOOTNOTES FOR STATEMENT

[1] The Commission has extended the investor tax certificate policy to cable television. *Policy Statement on Minority Ownership of Cable Television Facilities,* 52 R.R.2d 1469, 1472 n.16 (1982).

[2] There are two principals involved, William Johnson is the controlling minority shareholder who originally owned 80% of the stock in the corporation. The remaining 20% is allegedly owned by the St. Louis Philanthropic Organization Inc. This ownership interest is disputed by SLCC and is the subject of pending litigation. To secure adequate financing, Johnson has transferred 50% of his interest to Chase Enterprises. Chase also retains an option to purchase Johnson's remaining shares.

[3] The policy position taken by the majority creates an unfair investment climate for minority entrepreneurs. Non-minority investors are allowed to contribute "start up" capital, sell their investment to anyone and obtain an investor tax certificate. Minority entrepreneurs who invest in themselves and hold controlling interests are unable to enjoy similar tax benefits. Moreover, with the demise of the General Utilities Doctrine, the remaining controlling minority shareholder is taxed at two levels, corporate and individual, upon the sale of the cable system. Such an approach is simply bad policy, providing a disincentive for minorities to invest in their own enterprises.

[4] Because of the unique facts of this case, I need not address the broader policy issue concerning whether the Commission should *routinely* grant tax certificates to incumbent minority owners when they sell their properties to non-minorities. However, I shall discuss it because the majority appear to reach this issue. The primary concern appears to be that such a policy would create an incentive for minorities to "sell out," thereby reducing the number of minority owners., First, there is no indication that such a policy would have a negative impact on entry level minority ownership. Based on an informal survey of cases, there have been approximately 183 minority tax certificates granted since 1978. Approximately 7 (3.8%) of these transactions involved minority to minority transfers. Thus, an overwhelming majority (96%) of minority broadcasters acquired their facilities from non-minority entities. Obviously, granting tax certificates to incumbent minority controlled entities upon the sale of their facilities would not diminish the incentives for non-minorities to use the tax certificate policy to sell to minorities. Second, requiring minority owners to reinvest in *controlling* interests ensures that there would be no decline in minority ownership. On the contrary, they would be in a position to reach larger audiences. On balance, such a policy would not impair minority ownership in broadcasting and cable.

[5] The simple unfairness of the decision is exacerbated because the minority's decision not only denies a tax certificate to SLCC but appears to prevent Mr. William Johnson, as an individual, from receiving an investor tax certificate. If SLCC had known in advance of the Bureau's incorrect assessment of the facts in *Connection,* it would have had the opportunity to either restructure its corporate form or its arrangement with TCI.

[6] This is not a case where the filing of a petition for reconsideration tolls the time period for *sua sponte* reconsideration by the Commission. *See Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37, 48 n.51 (D.C. Cir. 1978). Although the Commission has received correspondence in this case, none appears to constitute a petition for reconsideration as defined in our rules.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: St. Louis City Communications, Inc., CSR-3137

I write separately to explain why I changed my vote and now oppose SLCC's request for a tax certificate. This does not imply any lack of support for the tax certificate policy. On the contrary, I strongly support it. Minorities own fewer than three percent of all broadcast stations, and an even smaller percentage of cable systems. The tax certificate addresses this severe underrepresentation by giving sellers an economic incentive to seek out minority buyers. Since the policy was adopted in 1978, we have issued 183 tax certificates (178 for broadcast stations and five for cable systems) and the number of minority-owned stations has gradually increased.

I originally voted to issue a tax certificate to SLCC because I thought extending the policy to "tradeups" would further promote minority ownership. Giving SLCC a tax certificate upon the sale of its St. Louis system would have placed more money in SLCC's hands, and would have permitted a minority-owned company to upgrade its holdings more quickly. It would serve the public interest if more minority-owned companies acquired major-market TV stations and cable systems, instead of being largely relegated to marginal AM stations.

Nevertheless, I have decided to vote against this request. Extending our tax certificate policy as SLCC proposes might help a few minority-owned companies but, on balance, it would not contribute to the goals of the Commission's minority ownership policy. I have reached this conclusion for four reasons. First, granting SLCC a tax certificate does not further the primary objective of the tax certificate policy: to increase diversity by encouraging sales to minority buyers. If SLCC could obtain a tax certificate whether or not it sells to a minority-owned company, SLCC would have no incentive to seek out minority buyers. In fact, a grant would create a perverse incentive for minority owners to trade in stations simply to secure the benefit of the tax certificate. Extending our seller tax certificate policy to include non-minority buyers is a step in the wrong direction.

Second, I think the primary goal of our minority ownership policy has been and should continue to be to promote new entry. The biggest hurdle to minority ownership is securing the financing to buy a first property. Once a minority-owned company has operated a station and developed a track record, it will face fewer problems in raising money to buy a second or third station. Of course, the seller tax certificate is not purely a "new entry" policy. We currently grant tax certificates whenever a minority-owned company acquires a broadcast system or cable system, regardless of the number of stations or systems the company already owns. Nevertheless, I do not believe the seller tax certificate policy should be so supple as to cover the sale of a minority-owned facility to a non-minority.

Third, even absent a grant, SLCC and others similarly situated still benefit from our tax certificate policy. SLCC told the Commission that it plans to use the proceeds from the St. Louis sale to buy another media property. That acquisition will qualify for a tax certificate, which will assist SLCC in finding a property and negotiating a favorable price. (The tax certificate, of course, will be awarded to the seller, but as a practical matter, the buyer and the seller share the benefit of a tax certificate. The premise of our tax certificate policy is that giving a tax certificate to sellers will materially assist minority buyers.)

Finally, as a legal matter this decision follows established Commission policy. Although the 1982 policy statement is not a model of clarity, it appears that the "investor" tax certificate policy SLCC cites was designed to apply only if the station or cable system would continue under minority ownership following the investor's withdrawal. *Policy Statement and Notice of Proposed Rulemaking in Gen. Docket No. 82-797,* 92 FCC 2d 849, 857-58 (1982). For example, if a controlling minority stockholder buys back shares from a MESBIC or another original investor, that transaction would be covered by the investor tax certificate.

Under SLCC's interpretation, we would be obliged to grant a tax certificate whenever a minority-controlled company sells a station, as long as the company is controlled by its original investors at the time of sale. The *Policy Statement,* however, appears to preclude grant of an investor tax certificate to a company such as SLCC:

> Generally, to be eligible for a tax certificate such transactions must not reduce minority ownership of and control in the entity below 51 percent.

Policy Statement at 857 [footnote omitted]. *See also Policy Statement* at 858, n. 40. In this case, the "transaction" is sale of the cable company from SLCC to TCI; the "entity" is the cable company which will no longer be owned and controlled by minorities. Therefore, it appears that SLCC is not entitled to receive a tax certificate.

The case law interpreting the investor tax certificate is meager. The decision cites the three relevant cases– *Kevin F. Reed,* Mass. Med. Bur., released January 13, 1988; *Ben C. Fisher,* Mass Med. Bur., released January 30, 1987; and *Connection Communications Corporation,* CSR-3037, Mass Media Bur., released April 23, 1987. The first two cases flatly denied requests for tax certificates in circumstances similar to SLCC's. In *Kevin F. Reed,* for example, the minority owner "wishe[d] to upgrade his broadcast holdings by selling his station to a nonminority person and investing the proceeds in a station that has a potentially larger audience." Nevertheless, the Bureau found "no basis for treating minority- and non-minority-controlled licensees differently for tax purposes when they sell to nonminorities."

In *Connection,* the Bureau granted an investor tax certificate to shareholders of Connection Communications Corporation, a black-owned cable company, when the shareholders sold their stock back to the company. The Bureau noted that the shareholders had provided start-up financing to Connection. In that case, the "transaction" covered by the tax certificate was not sale of assets to a non-minority company, but sale of stock back to the minority-owned corporation. To be analogous to case, Connection would have had to be selling to a non-minority and itself seeking a tax certificate. These were not the facts in *Connection.*

All three "cases" were actually unpublished letters issued by the Mass Media Bureau. None of these decisions is necessarily binding on the Commission. Under the circumstances in this case we should pursue the primary

goal of our tax certificate policy: to encourage entry by minority companies. Granting a tax certificate to SLCC would not promote that goal and therefore, I must vote to deny the certificate.[1]

FOOTNOTE FOR STATEMENT

[1] I am acutely aware that my change of vote has reversed the outcome. We originally announced in a press release that by a 2-1 vote, we would grant the tax certificate. Instead, the Commission has now decided 2-1 to deny it. I deeply regret any injury the parties may have suffered in relying on the original press release. However, as we note in the heading of every Commission press release: "This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. *See MCI v. FCC*, 515 F. 2d 385 (D.C. Cir. 1975)." Accordingly, we cannot grant relief based on detrimental reliance on our press release and still preserve the integrity of the policy that only Commission orders constitute official action.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Complainants,

v. File No. E-88-73

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

and

SOUTHWESTERN BELL TELEPHONE COMPANY,
Complainant,

v. File No. E-88-118

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

and

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, *et al.*,
Complainants,

v. File No. E-88-120

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

and

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Complainants,

v. File No. E-88-119

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Complainant,

v. File Nos. E-89-41 through E-89-61

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Defendants.

and

PACIFIC BELL,
Complainant,

v. File No. E-89-62

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Complainant, aa v. File No. E-89-133

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: June 13, 1989; Released: June 13, 1989

By the Commission: Commissioner Dennis concurring in the result.

1. The Bell Operating Companies (BOCs) who are parties to the above-captioned formal complaints have filed motions to dismiss those complaints filed against them by the American Telephone and Telegraph Company (AT&T).[1] For reasons set out herein, we dismiss the AT&T complaints. On our own motion, and for further reasons set out below, we also dismiss the above-captioned BOC complaints filed against AT&T.

I. INTRODUCTION

2. All of the formal complaints at issue here were filed as contingent complaints in order to toll the statute of limitations set forth in 47 U.S.C. § 415. The complaints ask for damages in the event that the Commission finds, in the course of its review on remand of Special Access tariffs, that carrier facilities provided pursuant to Shared Network Facilities Agreements (SNFAs) and Special Access facilities are "like" services. *Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir.

1988) (*MCI Remand*). If the Commission so finds, AT&T alleges in its complaint that the defendant BOCs will have violated Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201-202, by providing Special Access services at tariffed rates higher than the charges specified in the SNFAs. AT&T seeks damages as measured by the difference between what AT&T paid for Special Access services under tariff and what AT&T should have paid based on SNFA rates, and seeks a Commission order reducing Special Access rates. The complaints filed by the BOCs allege, on the other hand, that, in the event the Commission determines that SNFAs and Special Access facilities are like services, defendant AT&T will have failed to remit Special Access charges properly due and owing under BOC tariffs, and requests damages measured by the difference between those charges.

II. AT&T'S COMPLAINT

A. *The Parties' Positions*

3. AT&T states that each of the defendant BOCs is a local exchange carrier (LEC) engaged in the provision of local exchange access service to AT&T. AT&T further states that it, like other interexchange carriers (IXCs), obtains Point of Presence (POP)-to-POP connections from the BOCs under BOC Special Access tariffs. These POP-to-POP connections are the sole facilities at issue in AT&T's complaint.[2]

4. In connection with the SNFAs, AT&T asserts that the terms and conditions under which the parties share capacity in multifunction SNFA facilities were prescribed by the court-approved Plan of Reorganization, which requires that all charges associated with SNFAs be fully cost-based.[3] AT&T avers that the Reorganization Plan requires that all costs associated with a multifunction facility shared under the SNFA must be fully allocated between the parties,[4] and that the owner of the facility receive a return on net investment based on its authorized rate of return.[5]

5. AT&T contends that in the event the facilities provided to AT&T pursuant to the SNFAs and Special Access are determined to be "like services" and their rate differential unreasonably discriminatory under Section 202(a) of the Act, the Commission should reduce the Special Access rates prospectively and award AT&T damages measured by the difference between what AT&T paid for services under the BOCs' Special Access tariffs and what it would have paid for those services if the SNFA rates had been applied.

6. The BOCs contend that AT&T has not stated a cause of action entitling it to damages even if the Commission should determine that SNFAs and Special Access services are "like" services and that any difference in their respective rates constitutes unreasonable discrimination. The BOCs contend, *inter alia*, that AT&T's complaint is legally insufficient on its face and must be dismissed because the complaint does not establish a *prima facie* claim of discrimination against AT&T under Section 202(a). The BOCs argue that, inasmuch as all interexchange carriers, including AT&T, were charged the same rate for Special Access services under the tariffs, there can be no showing of discrimination against AT&T.

7. The BOCs also point out that AT&T does not claim that the Special Access rates applicable to the POP-to-POP connections are, in and of themselves, unjust and unreasonable under Section 201(b) of the Act. The BOCs contend they have complied with their legal obligation by charging AT&T the applicable tariff rate for POP-to-POP connections, and the FCC has not found (and in this case is not undertaking to determine) that rate to be unjust or unreasonable.

8. In response, AT&T states that the basis of its Section 202(a) discrimination claim is merely that the Special Access rates differ from the rates charged under SNFAs. Whether this disparity is unlawful can only be determined once the Commission has decided whether Special Access and SNFA are "like services," according to AT&T.[6] AT&T also takes issue with the BOCs' contention that the complaint fails to state a cause of action under Section 201(b). AT&T argues that the SNFAs were established in judicial proceedings in which AT&T's Plan of Reorganization was approved by the District Court, and that, pursuant thereto, the SNFAs were ordered to be cost-based.[7] Thus, AT&T avers, if the Commission should conclude that Special Access and SNFAs are like services and that any differences in charges are unreasonably discriminatory, the Special Access rates must be viewed as excessive and, hence, unjust and unreasonable. Thus, AT&T claims its complaint clearly states a cause of action under Section 201. As to the BOCs' argument that AT&T has failed to allege any damages, AT&T points out that under Section 208 of the Communications Act a complaint will not be considered legally deficient simply because damages are not specified or ultimately found.[8]

B. DISCUSSION

9. AT&T's complaint, which expressly is made contingent on the outcome of the SNFA remand proceeding,[9] seeks an award of damages from the BOCs if the Commission finds in that proceeding "that the facilities provided pursuant to the SNFAs and Special Access are 'like services,' and that any difference in the rates is unreasonably discriminatory under Section 202(a) . . . "[10] AT&T's complaint also seeks damages from the BOCs under Section 201(b) on grounds that AT&T paid Special Access rates that were unjust and unreasonable.[11] For the reasons stated hereafter, AT&T's complaint fails to state a *prima facie* case of violation under either Section and, consequently, should be dismissed.[12]

10. In order to recover damages under Section 202(a), a complainant must be capable of showing that it actually was damaged by virtue of the unlawful discrimination or preference proscribed by that Section.[13] Under the Communications Act, carriers are liable for damages in complaint proceedings only to "the person or persons injured" by their unlawful acts or omissions. 47 U.S.C § 206. AT&T's complaint was filed pursuant to Sections 206-209, and it specifically asks for damages "under Section 206 of the Communications Act."[14]

11. AT&T has not alleged that it was damaged because others paid less due to any claimed rate discrimination between SNFAs and special access. In fact, the phase of the Special Access investigation that was remanded to this Commission for further proceedings was initiated to determine whether the simultaneous existence of SNFAs and Special Access might create unlawful discrimination *in favor of AT & T*. The Court of Appeals also observed that this is the purpose of the SNFA phase of that investigation. *See, e.g., MCI Remand*, 842 F.2d at 1307 (FCC on remand must "devise an appropriate investigation to en-

sure that *interexchange carriers other than AT & T* are not being forced to pay unjustly or unreasonably discriminatory rates") (emphasis supplied). The investigation thus is designed to determine whether the SNFA rates "confer an unreasonable or unjust advantage on AT&T vis-a-vis other interexchange carriers." 842 F.2d at 1306. Any discrimination under investigation in the remand proceeding would favor rather than injure AT&T. Having failed to allege or present a *prima facie* case of injury as a result of the asserted rate discrimination between SNFAs and Special Access, AT&T has not stated a cause of action that would sustain a complaint under Section 202(a). Under the Commission's rules, such a complaint "will be dismissed." 47 C.F.R. 1.728(a).[15]

12. As noted previously, AT&T's complaint and responsive pleadings also seek damages under Section 201(b) on grounds that AT&T paid Special Access rates that were unjust and unreasonable. But AT&T's Section 201(b) complaint is based on a theory that is faulty on its face. AT&T contends that the lawfulness of the SNFAs was established conclusively in the antitrust proceeding. It reasons from that premise that the Special Access rates must be unjust and unreasonable if the Commission now should find that SNFA and Special Access are "like services" offered at unreasonably disparate rates.[16]

13. AT&T's premise is simply incorrect. The district court required AT&T to submit a plan of reorganization for court approval in order to determine whether the reorganization plan was consistent with the requirements of the Modification of Final Judgment (or MFJ) that the court adopted to settle the government's antitrust case. A determination that the methods used to compute SNFA lease charges are consistent with MFJ requirements cannot be equated with a determination of any Communications Act question. As the Court of Appeals found in the remand order in this proceeding:

> Although the District Court approved the SNFAs as a means for dividing extant multifunction facilities between AT&T and the BOCs, it did not examine actual leases or compare charges thereunder with any other set of tariffs. That responsibility fell to the FCC, whose standards are set forth in the Communications Act.

MCI Remand, 842 F.2d at 1304. AT&T's Section 201(b) complaint, bottomed on this essential but faulty premise, thus does not state a cause of action under that section and must be dismissed.[17]

14. AT&T's reasoning from that premise is faulty, moreover, even if the premise were valid. It would not follow, as a logical matter, that the Special Access rates are excessive simply because the SNFA rates are lawful and there is a disparity between the rates.[18] Just and reasonable rates are defined by a zone within which a range of disparate rates might be lawful. Rates that are entirely reasonable when viewed in isolation still may be unlawfully discriminatory if the rates result in different customers paying different charges for "like services." *See MCI Remand*, 842 F.2d at 1303. Findings by the FCC that there is an unlawful discrimination between those rates and Special Access would not necessarily mean that the Special Access rates, "viewed in isolation," are excessive -- even if the Commission should find also that the SNFA rates are just and reasonable. AT&T's reasoning as an abstract proposition thus does not make a *prima facie* case of violation of Section 201(b), even if its premise were valid.

III. THE BOC COMPLAINTS

15. In contingent complaints and cross-complaints of their own, the BOCs ask the Commission to require AT&T to pay them the difference between Special Access charges and the charges AT&T actually paid under the SNFAs if the Commission on remand finds that the two sets of charges are for "like services" and that the differences amount to an unreasonable discrimination.[19] The BOCs' argument is that AT&T is obliged to pay tariffed rates in the absence of a valid contract, and that a finding of likeness and discrimination means that the SNFA rates were invalid. In such a case, the BOCs contend, AT&T should have paid the Special Access rates and should be required now to make up the difference in the form of damages.

16. On our own motion, we will dismiss the BOCs' complaints and cross-complaints against AT&T. Like AT&T's complaint against the BOCs, these complaints fail to state a cause of action under the Communications Act and must be dismissed. 47 C.F.R. § 1.728.

17. Title II of the Communications Act was designed primarily to protect customers in their dealings with communications common carriers. The complaint provisions in particular make a carrier liable to its customers for any damages that result from the carrier's unlawful actions or omissions. 47 U.S.C. §§ 206-209. The BOCs' complaints in this case would subvert that design and turn the complaint procedures into a collection mechanism for the carriers.[20]

18. In effect, the BOCs allege conditionally that AT&T, one of their interexchange carrier customers, has failed to pay the tariff rates for Special Access services. It is true that this case does not involve the typical customer-carrier relationship. The "customer" in this case is AT&T, which is itself the largest carrier in this country. But the pertinent inquiry for determining the applicability of the complaint procedures focuses on the relationships between the BOCs and AT&T with regard to the charges in question. As to those charges, the BOCs clearly are the "carriers" providing service to AT&T as the "customer." The complaints do not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act -- allegations that might properly be the subject of a complaint. *See* 47 U.S.C. § 208(a). Rather, they allege conditionally that AT&T may have failed to pay the lawful charge for service. Such allegations do not state a cause of action under the complaint procedures and are properly dismissed.

19. Another defect of the BOC complaints is that, like AT&T's Section 201(b) complaint, the BOC complaints proceed from a faulty premise and depend upon fundamentally unsound reasoning. The BOCs presume incorrectly that the Special Access tariff rates are applicable automatically if it is found that a discrimination exists between those rates and SNFA rates.[21] But this Commission has not prescribed the Special Access rates, and it did not find them to be just and reasonable in all respects after investigation. It simply is not sufficient to sustain these complaints for damages to assert that the Special Access tariff rates automatically would apply if the SNFA rates are found to be discriminatory.

IV. CONCLUSION

20. For the reasons set out herein, we find that the instant complaints of AT&T have failed to state a *prima facie* case and, pursuant to 47 C.F.R. § 1.720(b), should be dismissed accordingly. We also find that the BOC complaints have failed to state a cause of action for which relief can be granted pursuant to the Communications Act and, pursuant to 47 C.F.R. § 1.728, also should be dismissed.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and sections 1.720(b) and 1.728 of our Rules, 47 C.F.R. §§ 1.720(b) and 1.728, that the above-captioned complaints of AT&T ARE DISMISSED.

22. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and section 1.728 of our Rules, 47 C.F.R. § 1.728, that the above-captioned complaints of the BOCs ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following BOCs filed Motions or otherwise requested dismissal of AT&T Complaints in their Answers: MTN, NWB and PNB, File Nos. E-89-41 through E-89-43, Ameritech, File Nos. E-89-44 through E-89-48, Southern Bell Telephone and Telegraph Company and South Central Bell Company, File Nos. E-89-56 and E-89-57, New England Telephone and New York Telephone, File Nos. E-89-58 and E-89-59, Nevada Bell Telephone and Pacific Bell Telephone, File Nos. E-89-60-61 and Southwestern Bell Telephone Company, File No. E-89-133.

[2] AT&T Complaint at ¶ 34.

[3] *See* United States v. Western Electric, Inc. and American Telephone and Telegraph Company, Civil Action No. 82-0192, (D.D.C.) (Plan of Reorganization), (filed December 16, 1982), at 63-67. *See also MCI Remand*, 842 F.2d at 1298. SNFAs were provided where multi-use facilities could not be segregated between AT&T and the BOCs at the effective date of divestiture. *Id.*

[4] Plan of Reorganization, at 63.

[5] *Id.* at 64-65.

[6] *See* Opposition of American Telephone and Telegraph Company to the Ameritech Operating Companies' Motion to Dismiss, File Nos. E-89-44 through E-89-48, at 4-5.

[7] AT&T Complaint at § 36.

[8] Section 208 provides in pertinent part as follows:

> No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

[9] *See* AT&T Complaint at 2.

[10] *Id.*

[11] AT&T does not expressly claim in its complaint that the Special Access rates are unjust and unreasonable, but it does cite Section 201(b) as a provision of the Act that the BOCs have violated. AT&T Complaint at 2. In response to motions to dismiss its complaint, however, AT&T does assert that the Special Access rates are excessive, in violation of Section 201(b). Opposition of AT&T to Ameritech . . . Motion to Dismiss (filed April 6, 1989), at 6-7.

[12] The Commission's Rules governing complaint procedures require that pleadings "contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation . . . ." 47 C.F.R. § 1.720(b); *see also* 47 C.F.R. § 1.721(a)(5). In addition, any complaint "which does not state a cause of action under the Communications Act will be dismissed." 47 C.F.R. § 1.728(a).

[13] *See* Interstate Commerce Commission v. United States, 289 U.S. 385, 389-93 (1933). AT&T seeks an award of damages from the BOCs measured by the difference between Special Access tariff charges paid by AT&T and what AT&T should have paid. This would not be the applicable measure of damages for a Section 202(a) violation, however. "The question is not how much better off the complainant would be today if it had paid a lower rate . . . (but) how much worse off it is because others have paid less." *Id.* at 390.

[14] AT&T Complaint at 11.

[15] *See* RCA Global Communications v. Western Union, 521 F. Supp. 998, 1006 (S.D.N.Y. 1981)(district court dismisses part of complaint under Sections 206 and 207 for failure to allege damages).

[16] Opposition of AT&T to Ameritech . . . Motion to Dismiss at 6-7.

[17] This is not to say that a complaint by AT&T raising a *prima facie* case of violation of Section 201(b) necessarily would fail. If AT&T were to assert that the Special Access rates were excessive and set forth facts purporting to demonstrate that this is the case, a complaint would lie. But AT&T has not filed such a complaint. Its sole basis for claiming a violation of Section 201(b) rests on the premise, rejected by the court of appeals, that the SNFA rates already have been found lawful.

[18] *See* Opposition of AT&T to Ameritech . . . Motion to Dismiss at 7.

[19] *E.g.*, Verified Complaint of Illinois Bell, *et al.* (filed May 23, 1988); Cross Complaint of Mountain States, *et* al. (filed March 24, 1989).

[20] The BOCs have cited no precedent to support the proposition that tariff rate collection matters are a proper subject of complaints under Title II.

[21] *E.g.*, Verified Complaint of Illinois Bell, et al., at 6; Cross Complaint of Northwestern Bell, *et al.*, at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of

Amendment of the Commission's Rules for Rural Cellular Radio Service — RM 5167

FURTHER ORDER ON RECONSIDERATION

Adopted: April 21, 1988; Released: May 18, 1988

By the Commission:

1. Various parties have filed petitions[1] for further reconsideration of the Order On Reconsideration, Amendment of the Commission's Rules for Rural Cellular Radio Service (Order on Reconsideration) CC Docket 85-388, 2 FCC Rcd 3366, 52 Fed.Reg. 22461 (1987).[2]

BACKGROUND

2. The *First Report and Order, Amendment of the Commission's Ruling For Rural Cellular Service*, CC Docket No. 85-388, 60 Rad.Reg.2d (P & F) 1029, 51 Fed.Reg. 26895 (1986), amended the rules pertaining to the provision of cellular radio service to Rural Service Areas (RSAs) or areas outside the top 305 metropolitan markets. This Commission adopted defined boundaries for RSAs to eliminate confusion among applicants and to avoid the administrative difficulties that would occur in the processing of applications for undefined geographic areas. A proposal by United TeleSpectrum, Inc. (United) was the model for the RSA boundaries.

3. The then existing rules for Metropolitan Statistical Areas (MSAs) required that the Cellular Geographic Service Area (CGSA) – the area defined by the applicant as that which it intended to serve – cover 75% of the area or population of the MSA, and that the licensee provide service to at least 75% of the CGSA within three years of the grant of the construction permit.[3] These requirements were applied by the *First Report and Order* to RSAs. Moreover, the antenna height/power limitations were raised to allow RSA operators to cover larger territories with scattered populations.

Order on Reconsideration

4. The *Order on Reconsideration* modified many of the initial RSA boundaries. It rejected requests that sought to define RSAs based upon criteria other than county boundaries, such as interstate highways or local access and transportation areas (LATAs). However, we split RSAs that contained non-contiguous counties into distinct RSAs. With the modifications and addition of certain United States territories, a total of 423 RSAs were created. In addition, we reexamined several technical and procedural issues to facilitate our goal of expeditiously providing cellular service to rural America. First, we eliminated the 75% CGSA coverage requirements for each RSA. Second, the RSA rules require that service to each CGSA commence within 18 months of the grant of a construction authorization and that the total system has to be operational within 36 months after the issuance of an authorization. The rules also require that 75% of the CGSA be covered by the 39dbu contours. We retained the rule that no *de minimis* extensions of the CGSA or 39 dBu contour would be permitted in the application stage thereby decreasing the administrative burden of processing applications and expediting the implementation of cellular service. Third, the *Order on Reconsideration* did not set forth procedures for filing applications for the unserved portions of the RSA. However, we had adopted procedures for filing applications for the unserved areas of MSAs. Under the MSA "fill-in policy" announced in the *Second Report and Order*, CC Docket 85-388, 2 FCC Rcd 2306, *pending recon.*, 52 Fed.Reg. 16847 (1987), MSA licensees or permittees may amend their applications to serve areas outside of their CGSA, but within the MSA, for a period up to five years from the date of the initial construction authorization in the market, without being subject to competing applications. After five years, others can file applications for the unserved portions of the MSA. *See* Section 22.31(a)(1)(i) of the Rules.

Petitions for Further Reconsideration and Discussion

5. Sixteen parties filed petitions for reconsideration of the *Order on Reconsideration*. The issues raised in these petitions are grouped in the following categories: (1) Does the MSA fill-in policy apply to RSAs? (2) Should we modify the CGSA requirements? (3) Should all applications in an RSA be considered mutually exclusive regardless of whether the proposed CGSAs would overlap resulting in multiple licenses for each RSA frequency block? (4) Should we permit limited 39 dBu contour extensions? (5) Should we further modify the RSA boundaries? and (6) Should we further clarify certain procedural and application content matters? These issues will be addressed in turn.

Fill-in Policy

6. Many petitioners contend that we should determine whether the MSA fill-in policy adopted in the *Second Report and Order* [4] will be applied to RSA permittees. We have considered this proposal, but we have determined that we do not have an adequate record before us to decide such a proposal. Therefore, in a companion document, we are inviting comments on this issue. *See Fourth Notice of Proposed Rule Making*, (Notice) CC Docket 85-388, FCC 88-157, adopted April 21, 1988.[5]

CGSA Requirements

7. Comp Comm argues that the present CGSA coverage requirements and application procedures encourage speculation and will lead to the filing of an extremely large number of applications. It asserts that most of the applications will minimally comply with the rule requirements and will be limited to single cell systems, which will not meet the public's needs. Comp Comm maintains that applicants of such applications will intend to profit from the resale of their permits instead of providing quality cellular service. After discussing three alternatives to the present rule, Comp Comm proposes that we decline to require applicants to file their financial or engineering information until after the lotteries are held. It proposes

that 120 days after the lottery, the tentative selectee would submit a final CGSA, appropriate engineering data and necessary financial information. Comp Comm further contends that we should adopt additional application and licensing procedures to assure that the selectees are *bona fide* applicants. Comp Comm asserts that its proposal will reduce the opportunity for speculation.

8. FWC Communications, Inc. (FWC) opposes Comp Comm's proposal contending that the existing rules sufficiently provide that cellular service will commence expeditiously to rural America. Even if there are speculators, FWC asserts that the present rules are essential for the development of viable rural cellular service since they permit applicants to build economical systems. It submits that the small size of the initial system proposed does not demonstrate an intent to provide poor quality service. In fact, FWC states that a one cell system may be adequate to provide cellular service to a substantial part of the population within an RSA. Also, FWC conjectures that RSA markets are not likely to be places for "get-rich-quick schemes" since RSA systems will have high construction costs and have only a small customer base and will, therefore, not be attractive to speculators.

9. We removed the former RSA coverage percentage requirements for CGSAs since they would have created severe economic burdens for permittees. *Order on Reconsideration* at para. 15. The present rules further the goal of expeditiously and efficiently providing rural cellular service to vast geographic areas. Comp Comm has failed to present persuasive arguments to modify the existing rules. Rather than have applicants file skeletal applications as proposed by Comp Comm, we will require applicants to file a complete application with all necessary information required by the rules, including their proposed CGSAs. Were we to allow applicants to file the skeletal application suggested by Comp Comm we would expect an influx of filings by speculators who would be filing little more than a lottery ticket. We recognize the need to adopt further measures to assure that only *bona fide* applications are filed and we are adopting procedures to discourage speculators from applying for rural Cellular licenses. *See Third Report and Order*, CC Docket 85-388, FCC 88-155, adopted April 21, 1988.[6]

Multiple Licenses For Each RSA

10. Centel Cellular Company (Centel) recommends that there should be multiple licenses for each RSA, consistent with the procedures of Section 22.31(a)(1) of the Rules.[7] Centel asserts that this Commission failed to explain why this rule is not applicable to RSA markets. Centel contends that even if there are non-mutually exclusive applications for the same frequency block, the present RSA rules unnecessarily permit only one license to be issued. Centel states that we properly applied Section 22.31(a)(1) to the MSA markets and we should apply that section to RSA applications as well. Centel contends that applicants for RSAs may be interested in serving discrete, non-overlapping portions of an RSA based upon the demographic, economic and market factors. For example, MSA licensees may elect to file applications for only those areas of the RSA that are adjacent to the MSA. Also, local exchange carriers may only want to provide service to their existing local exchange territories.[8] Alternatively, assuming that the reason for departing from Section 22.31(a)(1) was for administrative convenience, Centel indicates that there are specific circumstances that warrant processing and granting multiple applications for an RSA, which would not be burdensome to this Commission. Centel states these circumstances exist when there are less than ten applications for the frequency block and there is a settlement by all of the applicants for the frequency block in the RSA and the applicants agree to confine their CGSAs to non-overlapping areas.

11. The National Telephone Cooperative Association (NTCA) disagrees with Centel and asserts that small exchange carriers will not limit their RSA applications to their present local exchange territories, and they will file for all areas that are economically viable. However, NTCA agrees with Centel that there may be limited circumstances for granting multiple licenses. In particular, NTCA states that multiple cellular licenses can be awarded when there is a full settlement by the affected parties in the RSA. In addition, NTCA argues that we should not permit an MSA licensee to serve the adjacent RSA, unless the RSA licensee approves.

12. We are not deciding at this point whether we will grant more than one application per frequency block in each RSA or what our "fill-in" policy should be. Rather, in a *Notice of Proposed Rule Making* in this docket being adopted today, we are requesting comment on our tentative conclusions to grant only one authorization per frequency block (i.e., to define mutual exclusivity in terms of the RSA) and to adopt a five-year "fill-in" policy.[9] We intend to accept applications before reaching a conclusion in this companion Rule Making proceeding. Applicants should file for the areas within the RSA they intend to serve, and should not make any assumptions as to what fill-in and mutual exclusivity rules we will adopt after receipt of comments in the companion Rule Making proceeding. We note, however, that for any lotteries held prior to the conclusion of that proceeding, we will initially grant only one authorization per frequency block, unless there has been a full-market settlement. *See Third Report and Order* at n. 21. In this regard, we will temporarily waive Section 22.31(a) of our rules and any other rules or policies defining mutual exclusivity in terms of CGSAs. Losing applications will not be dismissed, however, until after we conclude the Rule Making proceeding. If we adopt rules that permit the grant of more than one authorization per frequency block (e.g., if we define mutual exclusivty in terms of overlapping CGSAs), we will then proceed with further lottery procedures to choose additional RSA licensees for each frequency block, as appropriate. We will also make whatever other adjustments, if any, that are appropriate after conclusion of the Rule Making proceeding.

Contour Extensions

13. The Cellular Corporation (TCC) requests that we amend Section 22.903(a) to permit extensions of 39 dBu contours over oceans, portions of the Gulf of Mexico that are not already licensed to Cellular carriers and foreign territories.[10] These extensions, it asserts, would be available on a secondary basis to licensees authorized to serve coastal areas. It concludes that many of these water areas are not economically profitable and that therefore there is little likelihood that separate applications will be filed for those areas. TCC states that in some coastal states county borders do not extend into adjoining bodies of water. Under existing rules, applicants would be precluded from using existing coastal antenna sites and would be obligated to use inland sites, resulting in inadequate service to

substantial coastal population centers and highways.[11] If we do not grant extensions at the application stage, TCC avers that there is an added administrative burden on the Federal Aviation Administration and this Commission, since antenna clearance studies would be performed twice; once for the initial application and once for the amended application. TCC and others assert that an amendment proposing to expand the CGSA would be a major amendment, subject to the petition to deny process. They allege that this would create further administrative burdens and delay Cellular service to RSAs. Centel supports this position, stating that applicants would be unreasonably burdened by having to design two different systems and by expending sums to obtain options for both inland and coastal cell sites. Centel, however limits its support to extensions over the Gulf of Mexico and the oceans.

14. To streamline further the processing of applications and to ensure that cellular service commences in rural America on an expedited basis, we did not adopt an extension policy.[12] *Order on Reconsideration* at para. 11. At the application stage, no CGSA or 39 dBu contour may extend beyond the boundaries of the RSA. *See* Section 22.903(a) of the Rules, as amended herein.[13] RSA applications that have extensions will be returned as defective. Our policy was adopted to eliminate a source of delay in Cellular application processing. The petitioners have presented no overriding reason to persuade us to depart from the existing requirements.[14] We conclude that petitioners could adequately serve coastal areas in complete conformance with the rules by using either directionalized antennas or by operating the transmitters at reduced power to keep the 39 dBu contour within the CGSA boundary, even in areas such as the Virgin Islands, Guam, and the Florida Keys. Under the current rules, an RSA applicant must submit a grantable application with no extensions. Once the application is granted, the applicant may elect to file an amendment to extend its 39 dBu contour.[15] Our approach will provide expeditious service to the public, and will allow permittees an opportunity at a later time to modify their 39 dBu contours as circumstances may require.

Boundaries

15. Parties filed a limited number of requests and oppositions thereto for boundary changes of certain RSAs. Many of these requests included specific demographic, economic and transportation pattern showings. When parties made persuasive and sufficient demonstrations consistent with the public interest, we modified the RSA boundaries. The requested boundary changes are enumerated in a list entitled "Modification of RSA Boundaries" appended to this document. This list of the RSA boundaries will be released in a subsequent public notice.[16] With these modifications, there are 428 RSAs.

16. In addition, two petitioners[17] requested that we change the boundaries to incorporate specific RSAs into either an existing MSA or NECMA. We previously have rejected similar requests. *Order on Reconsideration* at para. 6. *See also* Public Notice, Mimeo No. 6031, released August 19, 1983. Under this policy, we indicated that we will not alter our classification of MSAs, which was based upon the U.S. Department of Commerce, Bureau of the Census revised 1980 Statistical Abstract of the United States. Even though the Commerce Department may add counties to the MSAs or to NECMAs, for administrative purposes, we have adhered to the revised 1980 listing. A change in this policy would severely disrupt the orderly regulatory framework of cellular licensing. *See Order on Reconsideration* at para. 6. For these reasons, we will not add RSAs to existing MSAs or NECMAs, as requested by the petitioners.

Other Issues

17. Several petitioners have sought clarification of the procedural and filing aspects for RSA cellular applications. To expedite the processing of the applications, we have modified certain procedural and filing requirements, which are detailed in Appendix C. Other commenters requested clarification on specific aspects of the rules. These concerns are addressed below in a question and answer format.

a. What are the coverage requirements when more than one CGSA is proposed within the RSA? What are the requirements concerning the commencement of service for each additional CGSA within the RSA?

When more than one CGSA is proposed, the applicant must provide a minimum of 75% coverage for each CGSA. Service must commence in each CGSA within 18 months of construction permit grant, with the entire proposed system constructed within three years. *See* Section 22.903.

b. What is the status of MSA licensees that have CGSAs that extend into adjacent unserved areas, which are now classified as RSAs?

Under Section 22.903(a) and (b) of the Rules, we permit MSA licensees to have *de minimis* CGSA extensions into areas that are now defined as RSAs. RSA licensees must provide interference free protection to these MSA licensees, unless the MSA license was conditioned to require some other resolution. At the application stage, we will not require applicants to demonstrate that their facility will not interfere with MSA licensees that have such authorized *de minimis* extensions. However, once the applicant is the tentative selectee, it must demonstrate that it will provide interference free protection to these MSA licensees. Of course, MSA licensees must provide interference free protection to the RSA licensee's CGSA.

c. What is the current policy concerning water areas located in an RSA with respect to the CGSA coverage requirement calculations?

Applicants are required to serve 75% of the CGSA. This coverage requirement is based upon total geographic area, including water areas, such as lakes and rivers. *Order on Reconsideration* at n. 17. However, this was not meant to include large bodies of water, such as oceans and the Great Lakes, in making this calculation. This clarification modifies the language at n. 17 of the *Order on Reconsideration*. *See also Advance Mobile Phone Service Inc.*, 54 Rad.Reg.2d (P & F) 260 (1983).

d. Will adjacent CGSAs use a single call sign?

Each licensee in an RSA will operate under its own call sign. If the operator has adjacent CGSAs in neighboring RSAs or MSAs, there will be no consolidation of call signs. If the operator has multiple CGSAs within an RSA, it will have one call sign.

e. Will there be one filing fee for the entire RSA, or is there a separate filing fee for each CGSA?

We assess filing fees per application. Therefore, if one application has multiple CGSAs, we require only one filing fee.

CONCLUSION

18. In this proceeding, we have further modified the policies for the rural cellular radio service. Based upon local economic and demographic showings by the petitioners, we made limited modifications to the rural cellular service area boundaries. The majority of the present rules will facilitate our goal of expeditiously and efficiently providing cellular service to rural America, and for the most part, we have retained the rules without further modification. Where petitioners raised substantial concerns about the application of particular rules, we have clarified the rules and policies.

ORDERING PARAGRAPHS

19. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration and the Petitions for Clarification filed in this proceeding are GRANTED to the extent set forth herein, and are otherwise DENIED.

20. IT IS FURTHER ORDERED, that Part 0 and Part 22 of the Rules ARE AMENDED as specified in Rules Section appended to this Order. These amendments and other policies adopted in this Order will become effective 30 days after publication of this document in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

List of Parties Filing Pleadings

Petitions for Reconsideration/Clarification

BellSouth Mobility, Inc.

Bruce Telephone Co, Fulton Telephone Co., and Sledge Telephone Company

Centel Cellular Company

Comp Comm, Inc.

Florida Cellular Telephone Co.

GTE Mobilnet, Inc.

Law Offices of Dean George Hill, P.C.

Metro Mobile CTS, Inc.

Montezuma Mutual Telephone Co.

National Telephone Cooperative Association

Niagara Telephone Co.

PacTel Cellular

Puerto Rico Telephone Co.

South Carolina Telephone Association

Telephone and Data Systems, Inc.

The Cellular Corporation, Inc.

Responsive Pleadings

Alltel Mobile Communications, Inc.

Centel Cellular Company

Franklin Telephone Co., Inc.

Calhoun City Telephone Co., Inc., Delta Telephone Co., Inc., and Hughes Telephone Co., Inc.

FWC Communications, Inc.

Georgia Telephone Association

Montezuma Mutual Telephone Co.

National Telephone Cooperative Association

Ponderosa Telephone Co.

Public Service Commission of South Carolina

Rochester Telephone Corp.

Telocator Network of America, Cellular Telecommunications Division

APPENDIX B

Modifications of the RSA Boundaries

CALIFORNIA

RSAs CA 4 and 5 **Modified**

yes

Proposal a:

Separate San Louis Obispo and San Benito Counties, which are not contiguous.

Comments of:

- GTE Mobilnet
- Comp Comm, Inc.

Conclusion:

San Louis Obispo has a large population, approximately 183,000, which will allow it to stand alone as a separate RSA. San Benito, with a much smaller population, approximately 29,0000, will be listed with Merced and Madera Counties in RSA 4. San Benito is contiguous with Merced, which abuts Madera County.

Modified
no

Proposal b:

Create separate RSAs for Merced County and Madera County.

Comments of:

- PacTel Cellular
- Opposed by Ponderosa Telephone Co.

Conclusion:

PacTel contends that Merced and Madera Counties do not have a strong community of interest and should be separated. Ponderosa opposes this modification request. It asserts that there are strong community interests between these two counties evidenced by their connection by California State Highways 99 and 152. PacTel has has not demonstrated sufficient reasons to modify this RSA. Merced and Madera Counties will remain in RSA 4.

FLORIDA

RSA FL 1 Modified
yes

Proposal:

Remove Monroe County from RSA 1 and place it in a separate RSA.

Comments of:

- Florida Cellular Telephone Company

Conclusion:

Monroe County has few interconnecting highways or roads to Collier and Hendry Counties. Also we observe the mainland portion of the county is located in the Everglades National Park and the Cypress National Preserve, where construction of telecommunications facilities is restricted. Also the mainland portion of Monroe County has no substantial population or reported highways. Since Monroe County has no close ties with the other counties in this RSA it will be placed in a new RSA, RSA 11.

GEORGIA

RSAs GA 11 and 14 Modified
yes

Proposal:

Move Charlton County from RSA 14 to RSA 11.

Comments of:

- Comp Comm, Inc.

Conclusion:

Charlton County is not contiguous with the counties in RSA 14 and is contiguous with the counties in RSA 11. Highways 1, 23 and 301 connect Charlton with communities within RSA 11. Therefore Charlton County will be placed in RSA 11.

HAWAII

RSA HI 2 Modified
no

Proposal:

Delete Kalawao County.

Comments of:

- GTE Mobilnet

Conclusion:

GTE contends this county does not exist. Kalawao does exist as a separate county closely associated with Maui County. As such it will be retained as part of RSA 2.

IOWA

RSAs IA 4 and 6 Modified
yes

Proposal:

Move Washington County from RSA 4 to RSA 6.

Comments of:

- Montezuma Mutual Telephone Company
- Cellular, Inc.

Conclusion:

Montezuma requests that Washington County be placed in RSA 6. Previously, Cellular, Inc. requested that Washington County be included in RSA 4. Cellular, Inc. now supports the Montezuma's request. There are sufficient public interest reasons to grant this change, therefore Washington County will be moved to RSA 6.

MISSISSIPPI

RSAs MS 1-6 Modified
no

Proposal:

Various modifications were suggested for RSAs 1-6.

Comments of:

- Bruce Telephone Company
- Fulton Telephone Company
- Sledge Telephone Company

Opposed by:

- Franklin Telephone Company, Inc.
- Calhoun City Telephone Company, Inc.
- Delta Telephone Company, Inc.
- Hughes Telephone Company

Conclusion:

The parties do not agree on the proposed changes. In balancing the reasons presented by the parties, we are not persuaded that there are sufficient overriding public interest considerations presented to warrant modifying these RSAs. No modifications will be made.

PUERTO RICO

RSAs PR 1 and 5 **Modified** no

Proposal:

Add Rincon (RSA 5) to the Mayaguez MSA.

Add Ceiba and Naguabo (RSA 5) to the San Juan MSA.

Comments of:

- Puerto Rico Telephone Company

Conclusion:

We adhere to the policy stated in the *Order* at para. 6, and stated in *Public Notice*, Mimeo No. 6031, released August 19, 1983, that counties will not be added to existing MSAs. Therefore no modification will be made to these RSAs.

Rhode Island

RSA RI 1 **Modified** no

Proposal:

Add Newport County to the Providence MSA.

Comments of:

- Metro Mobile CTS, Inc.

Conclusion:

We will not modify existing MSAs. *See* Puerto Rico, *supra*. Therefore no change will made for this RSA.

South Carolina

RSAs SC 1 and 2 **Modified** yes

Proposal:

Separate Oconee and Abbeville Counties since they are not contiguous.

Comments of:

- Comp Comm, Inc.
- Metro Mobile CTS, Inc.

Conclusion:

Metro Mobile CTS, Inc. asserts that Oconee and Abbeville Counties located in RSA 1 are not contiguous and should be separated. Metro Mobile requests that Oconee should be added to either the Greenville MSA or the Anderson MSA. It further requests that Abbeville should be added to RSA 2 or to the Anderson MSA. Oconee County will remain as the sole county in RSA 1. It is cut off from the rest of the state by the Greenville-Spartanburg MSA and the Anderson MSA. Abbeville County will be added to RSA 2 since its population is too small to stand alone. Also RSA 2 contains all the counties surrounding Abbeville. As discussed, supra, present MSAs will not be modified to incorporate RSAs.

RSAs SC 3-6 **Modified** yes

Proposal:

Change RSAs 3, 4, 5 and 6:

RSA 3 - Move Lancaster and York Counties to a new RSA, RSA 9;

RSA 4 - Move Lee and Sumter Counties to RSA 6;

RSA 5 - Move Dillion County to RSA 4;

RSA 6 - Move Georgetown County to RSA 5.

Comments of:

- South Carolina Telephone Association
- South Carolina Public Services Commission

Conclusion:

The South Carolina Telephone Association (SCTA) has presented sufficient reasons pertaining to population, communities of interest, and geographic location, to support the proposed modifications. The South Carolina Public Service Commission supports this plan. The SCTA proposal will be adopted. Accordingly, the RSAs are renumbered.

VIRGINIA

RSAs VA 1, 3, 4 and 7 **Modified** yes

Proposal:

Add the following independently incorporated cities:

Norton City, add to RSA 1

Radford City, add to RSA 3

Martinsville City, add to RSA 4

South Boston City, add to RSA 7

Comments of:

- Comp Comm, Inc.

Conclusion:

These cities were inadvertently left off the prior boundary list, and are now added to the appropriate RSAs.

WISCONSIN

RSAs WI 4 and 10 (New) **Modified yes**

Proposal:

Make modifications to eliminate the non-contiguous counties in RSA 4.

Comments of:

- Niagara Telephone Company

Conclusion:

Counties in RSA 4 are not contiguous. They are separated by the Bay of Green Bay. The RSAs are modified to include the following changes:

RSA 4	RSA 10
Marionette	Door
Menominee	Kewaunee
Oconto	Manitowoc
Shawano	

Niagara Telephone Company also inquired why Florence County was moved from RSA 4 to RSA 3. Florence was moved from RSA 4 to RSA 3 in response to valid modification proposals submitted by Northeast Telephone Company and Wayside Telephone Company earlier in this proceeding.

APPENDIX C

Rules Section

Final Rules

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0--Commission Organization

1. The authority citation for Part 0 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended (47 U.S.C. 154, 303)

2. Section 0.401 is amended by revising paragraphs (b)(2)(i) and (b)(2)(ii) and adding paragraphs (b)(2)(iii) and (b)(2)(iv) to read as follows:

Section 0.401 Location of Commission Offices.

* * * * *

(b) * * *

(2) * * *

(i) Applications (other than those for initial rounds of rural cellular) and filings submitted by mail shall be addressed to: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554-1600.

(ii) Hand-carried applications (other than those for initial rounds of rural cellular) and filings shall be delivered to the Federal Communications Commission, 1919 M Street, N.W., Room L-18, Washington, D.C. 20554-1600.

(iii) Applications for initial rounds rural cellular filed by mail shall be addressed to: Federal Communications Commission, Cellular Telephone-Market No. (Enter RSA Market Number), P.O. Box 371995M, Pittsburgh, PA 15250-7995.

(iv) Hand-carried applications for initial rounds of rural Cellular shall be delivered to the Federal Communications Commission, Cellular Telephone Filing, Strip Commerce Center, 28th and Liberty Avenue, Pittsburgh, PA 15222 between the hours of 8:30 a.m. and 5:00 p.m. local time.

* * * * *

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22--Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.2 is amended by adding the following definition:

Section 22.2 Definitions.

* * * * *

Antenna Power Input. * * *

Archival Quality. The silver halide master microfiche or a copy made on silver halide film (such as Kodak Direct Duplicating Film).

* * * * *

3. Section 22.903 is amended by revising paragraph (a) to read as follows:

Section 22.903 Cellular System Service Areas.

(a) The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e) of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA. For MSAs and NECMAs below the top 90, the boundaries of the CGSA must include at least 75% of either the land area or population of the MSA or NECMA. The CGSA(s) must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) below. An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA.

(1) *Rural Service Areas.* At the time of initial application filing, no CGSA or 39 dBu contour may extend beyond the boundaries of the Rural Service Area (RSA). Any such initial application that has a CGSA or a 39 dBu contour that exceeds the boundary of the RSA will be returned as defective. An applicant may propose multiple CGSAs within the RSA. The 75% coverage of either the land area or population of the MSA or NECMA does not apply to RSAs. The CGSA must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. For RSAs the CGSA map need only depict the area(s) encompassed by any CGSA(s) within the RSA (and that portion of the RSA visible on the map) and must clearly depict on the face of the map the longitude, latitude and scale pursuant to Section 22.2. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) below. An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA.

* * * * *

4. Section 22.913 is amended by revising the section heading; redesignating paragraphs (a)(2) through (a)(10) as (a)(1) through (a)(9); amending newly redesignated paragraph (a)(9) by removing the last sentence; adding newly designated Section 22.913 (a)(10); amending paragraph (b) introductory text by removing the words "and for Rural Service Areas"; revising paragraphs (b)(2), (b)(4), and (b)(5); and amending paragraph (c) by removing the sixth sentence. The revisions read as follows:

Section 22.913 Content and form of MSA and NECMA applications.

(a) * * *

(9) An exhibit setting forth the information required by Section 22.13 (a)(1). In addition, all applicants other than publicly traded corporations must disclose parties with any ownership interest in another cellular application for the same market.

(10) An exhibit indicating whether a grant of the application will be a major action under Section 1.1305 of the Commission's rules.

(b) *Forms of applications.* Applications for construction permits for initial cellular systems in markets beyond the top-120 shall be filed as set forth below:

* * * * *

(2) The applicant's name and the market, market number and frequency block applied for must appear on the cover of the application.

* * * * *

(4) * * * The exhibits specified in Section 22.13 (a)(1) and (2) and Section 22.913 (a)(1), (7), (9), and (10) shall immediately follow the initial Form 401 * * *.

(5) The exhibits required by Section 22.913 (a)(3), (4), (6), and (8) shall not exceed three pages in length each.

(c) Copies. Each applicant for an initial construction permit in markets beyond the top-120 shall submit an original and one paper copy of its application. In addition, each applicant shall submit two microfiche copies of its application using 4 x 6 inch positive or negative copy microform, 24X reduction, and enclosed in a paper jacket. The following information must be printed on the jacket: the name of the applicant, the name and number of the market applied for and the frequency block designation. The two jacketed microfiche must be in an envelope accompanying the original application. The envelope must be labeled with the name of the applicant, the name and number of the market applied for and the frequency block designation. Applicants will keep the original of the application until after the lottery. The prevailing applicant in the lottery will then be required to submit the original hard copy application within fifteen (15) days of notice of the lottery results. Applicants for other forms of cellular authorizations shall submit an original and two paper copies.

* * * * *

5. A new Section 22.923 is to read as follows:

Section 22.923 Content and form of Rural Service Area applications.

(a) Applications for new stations or for modified facilities increasing the Cellular Geographic Service Area of existing stations shall be filed on FCC Form 401. The following exhibits shall be attached to any such application:

(1) An exhibit including a map or maps of the cellular system's existing Cellular Geographic Service Area, if any, and the Cellular Geographic Service Area proposed in the application. This exhibit shall contain all the information specified in Section 22.903(a)(1). In addition, this exhibit shall include an 8 1/2 by 11 inch reduced copy of the 1:250,000 or 1:500,000 scale map, depicting the complete RSA and any CGSA(s) therein. Boundaries of the RSA, CGSA(s), and 39 dBu contours must be clearly indicated. The full-size map need not be included in the microfiche copies of the application, but must be present in the original application from which the microfiche is made. For microfiching purposes, the reduced map is sufficient.

(2) An exhibit containing the engineering data and calculations used to derive the service contours shown. *See* Section 22.903(c).

(3) An exhibit stating how the proposal complies with the Commission's cellular design concepts, and indicating the applicant's projected method for coordinated expansion of the system in response to changing service demands.

(4) An exhibit indicating the basis which the applicant will use to determine whether sufficient congestion exists to warrant cell-splitting.

(5) An exhibit indicating the frequency plan to be used if the application is granted.

(6) An exhibit indicating the applicant's service proposals for local subscribers and roamers, including its method of handling complaints. If no change is made in service proposals previously authorized, this exhibit may be omitted.

(7) For new stations only, an exhibit including full particulars regarding the cost of construction of the proposed facilities and demonstrating how the applicant intends to finance construction. *See* Section 22.917.

(8) Where the applicant is a wireline carrier, an exhibit indicating exactly how its proposed system would interconnect with the landline network. This information must be of sufficient specificity to enable a potential competitor to design its system to connect with the landline system in exactly the same manner if the competitor so chooses.

(9) An exhibit setting forth the information required by Section 22.13(a)(1). Individual applicants holding less than 5% interest in a publicly held company must disclose the fact that the corporation and the applicant both have filed applications in the same RSA, its disclosure must include its percentage interest held in the company.

(10) An exhibit indicating the state and counties included in the applicant's CGSA.

(11) An exhibit indicating whether a grant of the application will be a major action under Section 1.1305 of the Commission's rules.

(b) Applications for construction permits for initial cellular systems for Rural Service Areas shall be filed as set forth below:

(1) Two microfiche copies of each application must be submitted and enclosed in microfiche jackets and be placed in a sealed 5 inch X 7 1/2 inch microfiche envelope. One microfiche jacket shall be labeled "Original" and the other jacket labeled "Copy". The microfiche must be reproduced only in negative form and in black and white (blue/black film which appears black to the naked eye is acceptable). The original microfiche must be of archival quality as defined in Section 22.2 of these Rules. Applicants are required to submit a Transmittal Sheet For Cellular Applications, copies of which may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

(2) Within seven (7) days of the release date of the public notice announcing the lottery results, the applicant selected first in the lottery shall submit the original and two hard copies of the application which must be enclosed in stiff covers and fastened securely along the left edge without exposed sharp edges (e.g., looseleaf binders, plastic binding strips, covered metal clasps).

(3) For initial RSA applications, FAA notification should not be made at the time of filing. Upon release of the public notice designating the tentative selectee, the applicant so designated must file Notice of Proposed Construction or Alteration (FAA Form 7460-1) with the FAA for any antenna or tower sites requiring FAA notification. Block 3A of FAA Form 7460-1 must contain the RSA number after the phone number so that the completed form can be associated with the proper application.

(4) FCC Form 401, Schedule B, Page 3, must contain the RSA number after the applicant's name so that the form may be reassociated with the application after proper clearances have been obtained.

(5) The applicant's name and the market, market number and frequency block applied for must appear at top right hand corner of each microfiche application. In addition the applicant's name and the market, market number and frequency block must also appear on a 5 inch X 7 1/2 inch microfiche envelope, which shall contain the microfiche applications. This information must be clearly labeled in print or mechanically reproduced. In addition, the information on the transmittal sheet and on the microfiche envelope must be identical.

(6) The completed transmittal sheet, the filing fee, and the microfiche envelope shall be placed in a 9 inch x 12 inch sealed enveloped. The applicants name and RSA market number must prominently displayed in the center of the envelope for all applications sent by mail and placed in the lower left hand corner for applications delivered to the Strip Commerce Center Facility.

(7) All Applicants must certify to the following on the Transmittal Sheet:

Certification

I hereby certify, under penalties of perjury, this application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

I also certify that the applicant is the real party in interest in this application and there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. It is also certified that the application intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.

I declare, under penalties of perjury, that I am the authorized representative of the above-named applicant in the above entitled matter, that I have read the foregoing certification; and that the matter and things therein stated are true and correct.

Executed on _____[date]

_____Signature

_____

TYPE/PRINT NAME TYPE/PRINT TITLE

All persons signing the Certification must do so using ink. No mechanical reproduction of signatures may be used.

(c) Applications proposing modifications to existing stations which do not involve new facilities, an increase in height or power of existing facilities, or an increase of any CGSA boundary, may be filed on FCC Form 489.

(1) Applications to extend the 39 dBu contours beyond the borders of the RSA once the original RSA application is granted must be accompanied by a detailed engineering justification demonstrating the necessity for such extensions.

FOOTNOTES

[1] A list of parties filing pleadings in this docket is appended to this order.

[2] Erratum, 52 Fed.Reg. 29186 (1987). All references to the Order incorporate revisions made in the Erratum.

[3] Reference to MSAs includes New England County Metropolitan Areas (NECMAs), as well.

[4] *See* para 4, *supra*.

[5] *See also* para. 12, *infra*.

[6] As discussed in detail in the *Third Report and Order*, *supra* at para. 30, prior to grant of a construction authorization, applicants may not sell or agree to sell interests in their applications.

[7] Section 22.31(a)(1) specifies that cellular applications will be considered mutually exclusive only if their proposed CGSAs overlap in such a way that grant of one would preclude the grant of another.

[8] Rochester Telephone Corporation and Alltell Mobile Communications, Inc. filed pleadings in support of this aspect of Centel's position.

[9] In our *Erratum*, we said we would grant only one application per frequency block in each RSA. Centel has questioned the basis for this conclusion. Given the close relationship between this issue and the unresolved fill-in policy issue, and in order to ensure that our decisions in this area are fully justified by the record, we are including this issue in the companion Rule Making proceeding.

[10] Alternatively, TCC requests clarification of this section to indicate that RSA extensions are prohibited only when they occur over an MSA or NECMA, or another RSA.

[11] Under existing rules, TCC avers that it would be impossible for a non-extended 39 dBu contour system to be built for the U.S. Virgin Islands, Guam and the Florida Keys. Centel contends that if extensions were not granted, it would be prevented from serving the coastal areas of Florida RSA 1 for Walton County.

[12] To avoid any confusion concerning extensions of the 39 dBu contour or CGSA, Section 22.903(a) has been revised to establish that no extensions of any nature will be permitted at the application stage.

[13] We will apply the same policy to RSAs as to MSAs with regard to the inclusion of water areas outside the coastline, e.g., water areas outside the coastline are specifically excluded from the RSA. *See Petroleum Communications, Inc.*, 3 FCC Rcd 399 (Mob.Serv.Div.1988) ("According to the U.S. Bureau of Census, the total area of the counties comprising the Chicago modified SMSA . . . does not include any part of Lake Michigan.") (citing *Further Order Prior to First Hearing Session*, CC Docket No. 82-721, Fitzpatrick, J. released December 10, 1982).

[14] Furthermore, there is no merit to the argument that there will be dulicative expense incurred by having to obtain approval from the FAA twice; first for the initial application and second for the application, as amended. Pursuant to Public Notice, Report No. CL-88-33 of November 27, 1987, cellular applicants for construction permits are not required to file FAA approval at the time of the initial filing. This will also be codified in Section 22.923 of the Rules.

[15] An amendment of this nature would be a major amendment, subject to petitions to deny, and must be accompanied by an engineering justification. *See* Section 22.923(c)(1), as amended herein. An amendment will not extend the time allowed for construction or for the initiation of cellular service. *See* Section 22.43(b)(1)(i).

[16] This public notice will supersede all prior RSA boundary lists.

[17] Puerto Rico Telephone Company and Metro Mobile CTS, Inc. made these requests, which are included in Appendix B.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-576

In the Matter of

Amendment of Section 90.235 of the Rules to Permit Secondary Fixed Tone Signaling and Alarm Operations in Part 90 Radio Services — RM-6380

REPORT AND ORDER

Adopted: June 15, 1989; Released: June 30, 1989

By the Commission:

I. INTRODUCTION

1. On December 12, 1988, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] that proposed to amend Section 90.235 of the Rules, 47 C.F.R. § 90.235, governing secondary fixed tone signaling and alarm operations (hereafter called signaling) in the private land mobile radio services. Specifically, our proposals were intended to provide all Part 90 licensees with greater opportunities to employ signaling in their land mobile operations. We also intended to standardize our operational criteria for signaling. On the basis of the comments submitted in response to the *Notice*, we find it in the public interest to adopt our proposals, with some minor refinements.

II. BACKGROUND

2. Petitions for Rule Making filed by Forest Industries Telecommunications (FIT) and the Manufacturers Radio Frequency Advisory Committee (MRFAC) served as the impetus for this proceeding.[2] The petitions requested that Section 90.235 of the Rules be amended to permit licensees in the Forest Products and Manufacturers Radio Services to conduct signaling operations similar to those now permitted in other Part 90 services.[3] Because both petitions address the same issues, they were consolidated into the *Notice*.

3. Section 90.235 of the Rules contains the operational and technical criteria that govern signaling operations. Currently, a licensee in any of seven Part 90 service categories may be authorized to conduct signaling operations on a secondary basis to primary mobile operations for purposes such as indicating equipment malfunctions, verifying equipment status, or activating alarms. The duration of any single non-voice signaling transmission is limited to two seconds and may be repeated three times except in the Power Radio Service, where the transmission may be repeated five times. Systems in the Public Safety Radio Services licensed prior to June 20, 1975, and in the Power and Petroleum Radio Services licensed prior to June 1, 1976, are permitted a six second transmission duration with five transmission repetitions.[4]

4. The *Notice* proposed to permit analog and digital secondary signaling in all Part 90 services, to retain the two second message length, to limit the number of signaling message repetitions to three, and to delete the limitation on specific uses for signaling. Additionally, the *Notice* proposed to add a requirement for automatic transmitter deactivation after five signaling transmissions for the same event. Existing signaling systems would also be "grandfathered" under rules in effect at the time of system authorization.[5] The *Notice* proposed, however, that systems in the Power Radio Service authorized on or after June 1, 1976, but prior to the effective date of rules adopted in this proceeding, would be permitted only three message repetitions.

III. COMMENTS/DISCUSSION

Signaling in all Part 90 radio services

5. The first issue set forth in the *Notice* was whether signaling capability should be extended to all Part 90 radio services rather than just to the seven service categories now authorized to conduct such operations. Generally, the commenters[6] support our proposed operational and technical standards for signaling.[7] All commenters agree with our proposal that a signaling option should be available to all Part 90 radio services.[8] Several commenters emphasize that their support of expansion of signaling operations to other services is conditioned on signaling remaining secondary to primary land mobile voice operations.[9] SIRSA, while supporting the expansion of signaling to other services, expresses concern about "the advisability of modifying the rules at this time to encourage the growth of an analog technique," and "that it would be more spectrally efficient to adopt rule amendments that are fashioned to promote the use of digital technology, particularly for the type of communications that are accommodated with tone transmissions."[10]

6. As noted above, signaling has been authorized in several Part 90 radio services for a number of years. Our experience to date shows that signaling operations can be conducted without causing significant interference to primary users. Moreover, as demonstrated by the comments, public benefits can result from signaling operations. As proposed in the *Notice*, therefore, Section 90.235 will be amended to permit fixed operation on a secondary basis for voice, tone, or impulse signaling. Digital emissions A1D, F1D, and G1D may, at the option of the licensee, be authorized.[11] Although we agree with SIRSA that digital technology may be more spectrally efficient, it is not suitable for every user employing signaling operations. Thus, we intend to provide users with the flexibility to decide which technology best meets their individualized communications requirements. Our action today preserves both analog and digital techniques as equally viable operational modes for signaling.

Message duration restrictions

7. The second issue raised in the *Notice* was whether existing signaling limitations on message duration should be retained or modified. The *Notice* proposed that, except for "grandfathered" systems, a signaling message shall not exceed two seconds in duration. Most of the commenters agree with this proposal.[12] NABER indicates that it supports our proposal provided that we further restrict the permissible signaling message duration to one second in

the Business Radio Service. NABER states that heavy congestion and frequency sharing in the Business Radio Service require that signaling message duration be shortened to minimize interference, and that current signaling technology can provide the needed signaling with message durations under one second.[13]

8. UTC states that it generally supports the two second signaling message duration provided that Power Radio systems licensed prior to June 1, 1976, are "grandfathered" at the six second limitation then in effect. They further contend that some utilities may require message durations of up to two minutes to poll load management systems, and suggest that provisions be made for authorization on a non-interference basis of longer message durations if the licensee is able to demonstrate the need for signaling messages in excess of two seconds.[14]

9. The Commission has given signaling secondary status to primary mobile operations and has imposed limitations on message duration to minimize interference to co-channel voice operations. As signaling technology advanced, it became possible to expand signaling capability under tighter technical standards. Accordingly, the Commission reduced the permissible message duration from six to two seconds.[15] The record indicates that the two second limit has been acceptable to licensees employing signaling operations. The *Notice*, therefore, proposed to retain the two second message duration.

10. NABER argues that because of channel congestion, signaling messages in the Business Radio Service should be limited to one second. We are not persuaded that reducing the message duration from two seconds to one second will yield any measurable improvement in interference protection or prevention. Signaling is authorized on a secondary basis, and licensees remain responsible for any interference caused. Consequently, we find no compelling need for a separate signaling message duration for the Business Radio Service.

11. Signaling operations such as those referenced by UTC requiring up to a two minute message length to poll load management systems are not permitted on mobile service frequencies under Section 90.235. Other frequencies, such as the 928/952 MHz fixed multiple address frequencies listed in Part 94 of the Commission's Rules, are available for such data and control operations without any message length limitations. Section 90.235 was developed to accommodate short duration signals for purposes such as control and alarms. Therefore, we adopt our proposal retaining the requirement that a signaling message length shall not exceed two seconds.[16]

Message repetition restrictions

12. The third issue raised in the *Notice* examined modification of existing restrictions on the number of times that a signaling message could be repeated. With the exception of "grandfathered" systems, the Rules presently permit three signaling message repetitions. The *Notice*, therefore, proposed to limit the number of signaling message repetitions to three for systems authorized after the effective date of the adopted rules. Our objective is to permit expanded use of fixed signaling with minimum impact on existing primary mobile operations. There have been no reported problems encountered by signaling users in the services where the rules permit three signaling message repetitions. The comments support our proposal to establish three signaling message repetitions as a standard for all services.[17] A three message repetition limitation will, in all likelihood, neither reduce the reliability of signaling nor result in interference with primary communications. We, therefore, adopt our proposal that licensees be permitted a maximum of three repetitions of the same signaling message. These message repetitions may, at the option of the licensee, be continuous or staggered at any interval. Systems in the Public Safety Radio Services authorized prior to June 20, 1975, and in the Power and Petroleum Radio Services authorized prior to June 1, 1976, will be permitted to retain five message repetitions until December 31, 1999, at which time such systems must fully comply with applicable rules.

13. The *Notice* also proposed that systems in the Power Radio Service authorized on or after June 1, 1976, but prior to the effective date of the new rules adopted in this proceeding, which are now permitted five message repetitions, would be required to comply with the three message repetition limitation. We proposed to bring Power Radio Service licensees into conformance with the three message limitation to correct an inconsistency between the Rules adopted in Docket 19790, *supra* n. 15, which specified a five message limitation, and the accompanying text in paragraph 7 of that *Report and Order*, which evidenced our intention to apply a three message limitation. UTC argues that although the *Report and Order* in Docket No. 19790 may have intended the three repetition limit to apply to the Power Radio Service, the adopted rules permit five repetitions. UTC further states that Power Radio licensees authorized on or after June 1, 1976, relied on the Commission's Rules and would have had no reason to refer to the 1975 *Report and Order*. Consequently, any reduction in the message repetition limit could adversely affect their existing system operation. UTC further states that "grandfathering" of these systems is unlikely to increase the potential for interference since the licensees have every incentive to reduce the number of message repetitions to the minimum necessary to assure trouble free signaling operations.[18]

14. Upon review of UTC's argument, we conclude that signaling systems in the Power Radio Service licensed prior to the effective date of the new rules adopted herein will be permitted to operate with the message repetition limits in effect at the time of signaling system authorization until December 31, 1999. After that date all systems will be required to comply with the three repetition limit. Except for the expansion of existing systems, all new signaling systems in any radio service, including the Power Radio Service, authorized after the effective date of the new Rules must comply with the three message repetition limit.

Automatic transmitter deactivation

15. The fourth issue raised in the *Notice* was whether to extend or modify our current regulations requiring deactivation of "stuck transmitters". Section 90.235 currently requires that automatic means shall be provided to deactivate a transmitter in the event a carrier remains on for a period in excess of three minutes.[19] In response to MRFAC's request, the *Notice* proposed to add the requirement that a transmitter also be automatically deactivated if the signaling transmission for the same alarm or control function is repeated more than five times, i.e., a "stuck transmitter" condition.[20]

16. The commenters indicate that to minimize interference to co-channel operations, automatic deactivation for "stuck transmitters" is necessary, and agree with our pro-

posal to expand the requirement for automatic transmitter deactivation to include shutdown after more than five successive transmissions of the same signaling message.[21] Accordingly, we adopt our proposal that automatic means shall be provided to deactivate the transmitter in the event the carrier remains on for a period in excess of three minutes, or if the transmission for the same signaling function is repeated consecutively more than five times.

Operational use restrictions

17. The final issue raised in the *Notice* was our proposal to eliminate all signaling use restrictions from the Rules. Section 90.235 of the Rules currently defines specific purposes for which signaling may be used in the Public Safety, Power, and Petroleum Radio Services. The commenters agree with our proposal in the *Notice* to remove the specified permissible uses for signaling. Because we are now extending signaling capability to all Part 90 radio services, it would not be practical to define or limit the many potential uses that all Part 90 licensees may have for signaling. We therefore adopt our proposal to remove the specific use provisions and will permit signaling transmissions meeting the message length and repetition requirements to be utilized for any purpose consistent with the Rules.

IV. CONCLUSION

18. Upon consideration of the comments and our experience with existing signaling systems, we find it in the public interest to permit licensees in all Part 90 radio services to utilize their authorized frequencies to conduct, on a secondary basis, fixed signaling operations. Therefore, we adopt rules, as set forth in the Appendix, that establish message duration and repetition limitations, describe transmitter deactivation requirements, and provide operational flexibility in the use of signaling systems. New signaling systems may now be used for any purpose consistent with the Commission's Rules. Existing signaling systems may continue to operate under the signaling rules in Section 90.235 that were in effect at the time of signaling system authorization until December 31, 1999.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

Need and purpose of this action:

19. The Commission is adopting this *Report and Order* to expand the use of signaling to all Part 90 radio services. This action will permit greater use of the land mobile radio spectrum and will extend the benefits of signaling capability to more licensees.

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

20. No comments were received that addressed our Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected:

21. The unrestricted use of signaling was considered and rejected on the basis that any deletion of message length, message repetition, and automatic transmitter deactivation requirements could lead to significant interference to primary mobile operations.

VI. PAPERWORK REDUCTION ACT STATEMENT

22. The action herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

VII. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to Sections 4(e) and 302(r) of the Communications Act of 1934, as amended, Part 90 of the Commission's Rules are AMENDED as set forth in the Appendix below.

24. IT IS FURTHER ORDERED that this *Report and Order* will be effective **August 14, 1989.**

25. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R Section 90.235 is revised in its entirety to read as follows:

§ 90.235 Secondary fixed signaling operations.

Fixed operations may, subject to the following conditions, be authorized on a secondary basis for voice, tone, or impulse signaling on a licensee's mobile service frequency(ies) above 25 MHz within the area normally covered by the licensee's mobile system. Voice signaling will be permitted only in the Police Radio Service.

(a) The bandwidth shall not exceed that authorized to the licensee for the primary operations on the frequency concerned.

(b) The output power shall not exceed 30 watts at the remote site.

(c) A1D, A2D, F1D, F2D, G1D and G2D emissions may be authorized. In the Police Radio Service, A3E, F1E, F2E, F3E, G1E, G2E, or G3E emissions may also be authorized.

(d) Except for those systems covered under subparagraph (e) of this section, the maximum duration of any non-voice signaling transmission shall not exceed 2

seconds and shall not be repeated more than 3 times. Signaling transmissions may be staggered at any interval or may be continuous. In the Police Radio Service, the maximum duration of any voice signaling transmission shall not exceed 6 seconds and shall not be repeated more than 3 times.

(e) Until December 31, 1999, for systems in the Public Safety Radio Services authorized prior to June 20, 1975, and in the Power and Petroleum Radio Services authorized prior to June 1, 1976, the maximum duration of any signaling transmission shall not exceed 6 seconds and shall not be repeated more than 5 times. For Power Radio Service systems authorized between June 1, 1976 and (effective date of rules), signaling duration shall not exceed 2 seconds and shall not be repeated more than 5 times. Such systems include existing facilities and additional facilities which may be authorized as a clear and direct expansion of existing facilities. After December 31,1999, all signaling systems shall be required to comply with the two second message duration and three message repetition requirements.

(f) Systems employing automatic interrogation shall be limited to non-voice techniques and shall not be activated for this purpose more than 10 seconds out of any 60 second period. This 10 second time frame includes both transmit and response times.

(g) Automatic means shall be provided to deactivate the transmitter in the event the carrier remains on for a period in excess of 3 minutes or if the transmission for the same signaling function is repeated consecutively more than five times.

(h) Fixed stations authorized pursuant to the provisions of this section are exempt from the requirements of §§ 90.137(b), 90.425, and 90.429.

(i) Base, mobile, or mobile relay stations may transmit secondary signaling transmissions to receivers at fixed locations subject to the conditions set forth in this section.

(j) Under the provisions of this section, a mobile service frequency may not be used exclusively for secondary signaling.

(k) The use of secondary signaling will not be considered in whole or in part as a justification for authorizing additional frequencies in a licensee's land mobile radio system.

FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 88-576, 3 FCC Rcd 7212 (1988).

[2] Petition for Rule Making, RM-6380, filed on March 30, 1988 by Forest Industries Telecommunications. Petition for Rule Making filed by the Manufacturers Radio Frequency Advisory Committee on July 25, 1988.

[3] 47 C.F.R. § 90.235 permits tone signaling only in the Local Government, Police, Fire, Highway Maintenance, Forestry Conservation, Power, and Petroleum Radio Services.

[4] *See* 47 C.F.R. §§ 90.235(c)(4), (c)(5), and (c)(6).

[5] *See Notice*, paras. 7-15.

[6] Comments were filed by FIT, MRFAC, Motorola, Inc. (Motorola), Special Industrial Radio Service Association, Inc. (SIRSA), National Association of Business and Educational Radio, Inc. (NABER), American Petroleum Institute (API), Utilities Telecommunications Council (UTC), and the Association of American Railroads (AAR). No reply comments were received.

[7] In the *Notice*, comments were sought on an alternative proposal to remove all technical and operational restrictions on signaling transmissions, and to permit licensees to employ signaling on an unrestricted basis. *See* Notice at para. 16. The commenters oppose this alternative proposal, generally agreeing that removal of all signaling restrictions could lead to significant interference to primary authorized operations. As discussed later, we concur with the commenters on this issue and find a continued need for certain technical and operational restrictions on signaling operations.

[8] In its comments, AAR indicates that specialized tone signaling operations similar to those in Section 90.235 are permissible on the 160 MHz frequencies assigned to the Railroad Radio Service pursuant to Sections 90.91(c)(3) and (c)(4) of the Rules, 47 C.F.R. §§ 90.91(c)(3) and (c)(4). AAR further states that it assumes that the Commission does not intend to change the Railroad Radio Service signaling provisions. This proceeding concerns only signaling operations governed by Section 90.235. Sections 90.91(c)(3) and (c)(4) are unaffected by this action.

[9] UTC Comments at 2, MRFAC Comments at 3, Motorola Comments at 2, and SIRSA Comments at 4.

[10] SIRSA Comments at 4.

[11] *Notice*, Appendix, para. 2.

[12] FIT Comments at 2, MRFAC Comments at 3, API Comments at 7, and UTC Comments at 3.

[13] NABER Comments at 4.

[14] UTC Comments at 3.

[15] *See* Amendment of Part 89 to Permit Expanded Use of Tone and Impulse Signaling in the Public Safety Radio Services, Report and Order, Docket No. 19662, 53 FCC 2d 134 (1975) at para. 10, and Amendment of Part 91 to Permit Expanded Use of Tone and Impulse Signaling in the Petroleum Radio Service, First Report and Order, Docket No. 19790, 57 FCC 2d 317 (1976) at para. 6.

[16] To minimize any effect on existing systems, signaling operations licensed in the Public Safety Radio Services prior to June 20, 1975, and in the Power and Petroleum Radio Services prior to June 1, 1976, will be permitted to retain the six second message duration limitation until December 31, 1999, at which time such systems must fully comply with all applicable rules. This should allow for amortization of all existing equipment.

[17] FIT Comments at 2, MRFAC Comments at 3, API Comments at 7, and UTC Comments at 4.

[18] UTC Comments at 4.

[19] *See* § 90.235(c)(10).

[20] *See* Notice at paras. 14 and 15.

[21] FIT Comments at 3, SIRSA Comments at 6, Motorola Comments at 3, and MRFAC Comments at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

ORDER

Adopted: June 15, 1989; Released: June 15, 1989

By the Chief, Common Carrier Bureau:

1. On June 12, 1989, the Illinois Commerce Commission (Illinois Commission) and the Public Utilities Commission of Ohio (Ohio Commission) filed a joint motion requesting an extension of the pleading cycle established in the Second Further Notice in the above-captioned proceeding.[1] At present, comments are due on June 19, 1989, and reply comments are due on July 19, 1989. The Illinois Commission and the Ohio Commission request that we extend the time for filing comments to July 19, 1989, and extend the time for filing reply comments to August 18, 1989.

2. The Illinois Commission and the Ohio Commission state that comments in a second proceeding before the Commission, concerning Part 69 of the Commission's Rules, 47 C.F.R. Part 69, are due on June 26, 1989,[2] and that comments in a third proceeding before the Commission, concerning Open Network Architecture, are due on July 12, 1989.[3] They further state that they have significant interests in all three proceedings and that, with their limited resources, they will have insufficient time to analyze effectively the issues raised in this proceeding without the requested extension of time.

3. While it is the policy of the Commission that extensions of time shall not be routinely granted,[4] we are also sympathetic to the scheduling concerns that the Illinois Commission and the Ohio Commission raise in their joint motion. In a separate order, released June 15, 1989, we have addressed these concerns, at least in part, by extending by 45 days the pleading cycle in the Part 69 Rule Making that the Illinois and Ohio commissions claim contributed to the scheduling congestion.[5] In light of that separate action, an extension of the deadlines for filing pleadings in this proceeding would appear less important, and could, in fact, create scheduling congestion later in the summer. Moreover, we do not wish to delay unnecessarily the expeditious resolution of this proceeding, in view of the substantial public interest benefits of incentive regulation for local exchange carriers. We therefore deny the joint motion for extension of time.

4. Accordingly, IT IS HEREBY ORDERED, pursuant to Section 4(j) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(j), 155(c), and the authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the joint motion of the Illinois Commerce Commission and the Public Utilities Commission of Ohio described in paragraph 1 above, IS DENIED. Comments in this proceeding are due on or before June 19, 1989, and reply comments are due on or before July 19, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rule Making*, FCC 89-91 (released April 17, 1989).

[2] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, *Notice of Proposed Rulemaking*, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1988).

[4] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[5] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, *Order*, DA 89-667, released June 15, 1989 (Com. Car. Bur.) (extending filing deadlines for comments and replies from June 26, 1989, and July 26, 1989, respectively, to August 10, 1989, and September 11, 1989, respectively).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-298

In the Matter of

Amendment of Section 73.202(b), RM-6703
Table of Allotments,
FM Broadcast Stations.
(Decorah, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Decorah Radio, Inc. (petitioner), requesting the substitution of Channel 263C2 for Channel 265A at Decorah, Iowa, and the modification of its permit for Station KRDI-FM to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 263C2, if allotted.

2. Channel 263C2 can be allotted to Decorah in compliance with the Commission's minimum distance separation requirments with a site restriction of 2.9 kilometers (1.8 miles) north to accommodate petitioner's desired transmitter site.[1] As requested, we shall also propose to modify petitioner's permit to specify operation on Channel 263C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 263C2 at Decorah or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 263C2 for Channel 265A at Decorah since it could enable Station KRDI-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Decorah, Iowa	265A	263C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1989,** and reply comments on or before **September 5, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
2033 M Street, N.W., Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-19-26 and West Longitude 91-47-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-299

In the Matter of

Amendment of Section 73.202(b),	RM-6696
Table of Allotments,	
FM Broadcast Stations.	
(Lopez, Pennsylvania)	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robin B. Thomas (petitioner), requesting the allotment of Channel 233A to Lopez, Pennsylvania, as its first local FM service. Petitioner states that she will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Petitioner states that Lopez is located in Sullivan County, and that it has a 1980 U.S. Census population of 300 persons. However, we have been unable to confirm that Lopez is included in the U.S. Census.[1] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Lopez is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. Channel 233A can be allotted to Lopez in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence is required before the allotment can be finalized since Lopez is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We believe the public interest would be served by seeking further information on the status of Lopez as a community for allotment purposes since the allotment of Channel 233A could provide it with a first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the place listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lopez, Pennsylvania	–	233A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 21, 1989,** and reply comments on or before **September 5, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robin B. Thomas
R.D. 1, Box 114A
Muncy, Pennsylvania 17756
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We do note that Lopez is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 300. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for this allotment are North Latitude 41-27-28 and West Longitude 76-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-300

In the Matter of

Amendment of Section 73.202(b), RM-6708
Table of Allotments,
FM Broadcast Stations.
(York, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gleason Broadcasting Company, Inc. (petitioner), requesting the substitution of Channel 285C2 for Channel 285A at York, Nebraska, and the modification of its license for Station KAWL-FM accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Channel 285C2 can be allotted to York in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.0 kilometers (3.1 miles) southwest to avoid a short-spacing to Station KTCH-FM, Channel 287A, Wayne, Nebraska, and to accommodate petitioner's desired transmitter site.[1] As requested, we shall also propose to modify petitioner's license for Station KAWL-FM to specify operation on Channel 285C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at York or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such other interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 285C2 for Channel 285A at York, Nebraska, since it could enable Station KAWL-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
York, Nebraska	285A	285C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1989,** and reply comments on or before **September 5, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Anne Thomas Paxson, Esq.
Bechtel, Borsari, Cole & Paxson
2101 L Street, N.W., Suite 502
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-49-51 and West Longitude 97-37-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-263

In the Matter of

Amendment of Section 73.202(b), RM-6341
Table of Allotments,
FM Broadcast Stations.
(Brooklyn, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. At the request of Randy E. Henry (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3635 (1988), proposing the substitution of Channel 256C2 for Channel 257A at Brooklyn, Iowa, and the modification of petitioner's license for Station KSKB to specify the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 256C2, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 256C2 for Channel 257A at Brooklyn, Iowa, since it could enable Station KSKB to provide service to an increased area. As proposed, we shall also modify petitioner's construction permit to specify operation on the higher powered channel. Channel 256C2 can be allotted to Brooklyn in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in petitioner's outstanding construction permit.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Brooklyn, Iowa	256C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Randy E. Henry for Station KSKB, Brooklyn, Iowa, IS MODIFIED to specify operation on Channel 256C2, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-42-36 and West Longitude 92-27-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-366

In the Matter of

Amendment of Section 73.202(b),	RM-6260
Table of Allotments,	RM-6531
FM Broadcast Stations.	
(Jupiter and White City, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. At the request of Dennis L. Johnson (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 4695 (1988), proposing the allotment of Channel 288A to Jupiter, Florida, as the community's second local FM service. Petitioner, Joseph Bahr ("Bahr"), Kenneth Dawson ("Dawson"), Stephen Rowland ("Rowland"), Treasure Coast Media, Inc. ("Treasure Coast") and U.S. Three Broadcasting Corporation ("U.S. Three") filed comments. Treasure Coast also filed a counterproposal requesting the allotment of Channel 288A to White City, Florida, as the community's first local service.[2] Rowland and Dawson filed reply comments, to which U.S. Three responded.[3]

2. Petitioner, Bahr, Dawson and Rowland each state an intention to apply for Channel 288A, if allotted to Jupiter. Treasure Coast, licensee of Station WCXL(FM), Vero Beach, Florida, notes that the allotment at Jupiter is contingent upon the deletion of Channel 288A from Vero Beach, Florida. Therefore, it requests that action herein be delayed until after its petition for reconsideration of the *Report and Order* in MM Docket 86-284 which substituted Channel 279C2 for Channel 288A at Vero Beach and modified the license of Station WAVW(FM) accordingly, is decided. *See*, 3 FCC Rcd 1049 (1988).

3. U.S. Three, licensee of FM Station WKSY and AM Station WTRU, Jupiter, Florida, requests the allotment of Channel 288A to White City, Florida, and states its intention to apply for the channel if allotted. It contends that the allotment at White City would provide the community of 4,110 persons with its first local aural service as opposed to a third local aural outlet at Jupiter, with its population of 9,868 persons.[4] It submits that Commission policy and precedent make clear that the provision of a first local service is to be preferred over the allotment of a third local service, citing *FM Assignment Policies and Procedures*, 90 FCC Rcd 2d 88 (1982). U.S. Three also comments on a counterproposal filed by Treasure Coast in MM Docket 88-217, 3 FCC Rcd 3014 (1988), proposing the allotment of Channel 288A, instead of Channel 267A, to Port St. Lucie, Florida, so as to avoid a comparative situation with its counterproposal to upgrade Station WCXL at Vero Beach on Channel 272C2. U.S. Three states that the allotment of Channel 288A at Port St. Lucie would preclude the use of Channel 288A at either Jupiter or White City while the allotment of Channel 267A to Port St. Lucie, as originally proposed, would allow a first local service to two communities, Port St. Lucie and White City. Therefore, it urges the denial of Treasure Coast's counterproposal in MM Docket 88-217.

4. Rowland, in opposition to U.S. Three's counterproposal, questions its motives for seeking the allotment to White City and its commitment to apply for the channel, if allotted. He believes that U.S. Three's interest in a White City allotment is only as a means of eliminating competition to its Jupiter stations. To this end, he states that White City is located approximately 30 miles to the north-northwest of Jupiter, within the separate Fort Pierce market. Based on what appears to be a belief that common ownership of a station at White City and Jupiter would violate the Commission's duopoly rules, Rowland states that he presumes that U.S. Three would submit an application for the White City allotment with a conditional commitment to divest itself of Station WKSY(FM). However, he contends that this application would be filed with the hope that a competing application would be filed, thus enabling U.S. Three to dismiss its application with the net result being that there would be no competitive service instituted against its Jupiter station.

5. Dawson contends that the allotment of Channel 288A to Jupiter would in reality be the community's first local FM service, since Station WKSY(FM) has been off the air since the spring of 1987. He also argues that Jupiter is more deserving than White City of the allotment. Dawson states that White City, with a population of approximately 4000 persons, is almost surrounded by Fort Pierce and believes that it has become nothing more than a suburb of Fort Pierce. Jupiter, on the other hand, according to Dawson, has grown from almost 10,000 persons in 1980 to approximately 30,000 persons at the present time. He goes on to state that Jupiter has needs, interests and concerns of its own which are not served by the nearby Palm Beach stations or by the silent Station WKSY(FM).

6. In response, U.S. Three states that White City and Jupiter are 35 miles apart, not 30 as alleged by Rowland. It states that it is technically eligible to own a Class A FM station at both communities since they are sufficiently far apart so that the 3.16 mV/m contours would not overlap, thus permitting compliance with the Commission's duopoly rules.

7. After reviewing the pleadings before us, we find that the public interest would be served by alloting Channel 288A to Jupiter as its second local FM service and to White City as its first local FM service. In an effort to resolve the conflict, the Commission's staff has performed an engineering study and found that Channel 288A can be allotted to Jupiter, as proposed, and Channel 284A can be allotted to White City, as its first local FM service.[5] Therefore, a comparison of the two communities need not be made. As to the eligibility of U.S. Three to apply for Channel 284A at White City, we believe that our duopoly rules will not be an impediment since a Class A station's 3.16 mV/m contour extends only 13.5 kilometers (8.4 miles) from its transmitter. We also find that the counterproposal of Treasure Coast Media, Inc. in MM Docket 88-217 to allot Channel 288A to Port St. Lucie, Florida, is not an impediment to the allotment of the same channel

to Jupiter since it failed to file its counterproposal in this proceeding, thus providing the Commission with no basis upon which to compare the needs of the two communities.

8. Channel 288A can be allotted to Jupiter in compliance with the Commission's minimum distance separation requirements without a site restriction. Channel 284A can be allotted to White City in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (4.2 miles) north to avoid a short-spacing to Station WEAT-FM, Channel 282C, West Palm Beach, Florida.[6]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jupiter, Florida	258A, 288A
White City, Florida	284A

10. The window period for filing applications for Channel 288A at Jupiter, Florida, and Channel 284A at White City, Florida, will open on **August 15, 1989,** and close on **September 14, 1989.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of White City has been added to the caption.

[2] Public Notice of the counterproposal was given on October 7, 1988, Report No. 1752.

[3] U.S. Three's response to the reply comments constitutes an unauthorized pleading since the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods. However, we find that acceptance of its pleading as to the duopoly issue only will serve the public interest since it provides information of decisional significance. Therefore, its request to accept its response to reply comments will be accepted to the extent specified herein.

[4] Population figures are taken from the 1980 U.S. Census, unless otherwise indicatd.

[5] The Application for Review of the *Report and Order* in MM Docket 86-284 filed by Treasure Coast Media, Inc. opposing the modification of Station WAVW's license to specify Channel 279C2 in lieu of Channel 288A has been denied. *See, Memorandum Opinion and Order,* 4 FCC Rcd 2184 (1989).

[6] The coordinates for Channel 288A at Jupiter are North Latitude 26-56-30 and West Longitude 80-05-36. The coordinates for Channel 284A at White City are North Latitude 27-26-03 and West Longitude 80-20-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-262

In the Matter of

Amendment of Section 73.202(b), RM-6340
Table of Allotments,
FM Broadcast Stations.
(Laughlin, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: June 30, 1989

By the Chief, Allocations Branch:

1. At the request of John Brush (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3633 (1988), proposing the allotment of Channel 228C to Laughlin, Nevada, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 228C can be allotted to Laughlin in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.7 kilometers (3.5 miles) east to avoid a short-spacing to Station KRCK, Channel 229B, Coachella, California, and to Station KXTZ, Channel 231C, Henderson, Nevada.[1] Mexican concurrence has been received since Laughlin is located within 320 kilometers of the U.S.-Mexican border.

3. We believe the public interest would be served by allotting Channel 228C to Laughlin, Nevada, since an interest has been expressed in providing the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Laughlin, Nevada	228C, 300C1

4. The window period for filing applications will open on **August 15, 1989,** and close on **September 14, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-09-03 and West Longitude 114-30-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONSORTIUM COMMUNICATIONS INTERNATIONAL INC. File No. I-T-C-89-088

Application for authority to lease and operate facilities for service to Suriname.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: June 20, 1989; Released: June 29, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on April 6, 1989 by Consortium Communications International, Inc. (CCI) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct telex service to Suriname. The application was placed on public notice on April 19, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Suriname by CCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-088 IS GRANTED, and CCI is authorized to:

a. lease and operate 24 telegraph-grade circuits between the U.S. and Suriname;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide its authorized services including telex, between the U.S. and Suriname and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between CCI and its correspondent in Suriname, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

COMMONWEALTH	File No. 20046-CD-P/L-1-85
TELEPHONE	File No. 30423-CD-P/L-1-84
COMPANY	File No. 21966-CD-P/L-1-85

For authorization for new one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Freeland, Bloomsburg and Williamsport, Pennsylvania, respectively.

MOBILFONE OF	File No. 20940-CD-P/L-85
NORTHEASTERN	File No. 20948-CD-P/L-85
PENNSYLVANIA, INC.	

For authorization for one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Rutland Township, Bloomsburg and Williamsport, Pennsylvania, respectively.

SCHUYLKILL	File No. 20939-CD-P/L-1-85
MOBILE FONE,	File No. 22535-CD-P/L-1-85
INC.	

For authorization for one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Catawissa and Treverton, Pennsylvania, respectively.

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1989; Released: June 29, 1989

By the Commission:

1. By Memorandum Opinion and Order, Mimeo 6387 (released August 19, 1986) *(Order)*, the Mobile Services Division (MSD) dismissed the above-captioned applications of Commonwealth Telephone Company (Commonwealth), Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone) and Schuylkill Mobile Fone, Inc. (Schuylkill). Mobilfone and Schuylkill have filed applications for review of the *Order*. Commonwealth filed an opposition to the applications for review and Mobilfone and Schuylkill filed replies. Commonwealth did not file a petition for reconsideration or an application for review of the *Order*'s dismissal of its applications.

I. BACKGROUND

2. On October 3, 1984, Commonwealth filed an application to provide one-way paging service on 152.84 MHz frequency at Freeland, Pennsylvania (File No. 20046-CD-P/L-1-85), which was placed on Public Notice on October 10, 1984. On December 10, 1984, within the 60-day cut-off period set forth in Section 22.31(c) of the Rules, Mobilfone filed applications for the same frequency at Rutland Township and Bloomsburg (File No. 20940-CD-P/L-1-85) and at Williamsport (File No. 20948-CD-P/L-1-85), which were mutually exclusive with Commonwealth's Freeland application. Commonwealth filed an application to provide one-way paging service on the 152.84 MHz frequency at Williamsport (File No. 21966-CD-P/L-1-85) on February 15, 1985. The MSD dismissed this application because it was filed more than 60 days after the October 10, 1984 Public Notice of Commonwealth's Freeland application and it was mutually exclusive with Mobilfone's previously filed applications.

3. Commonwealth filed applications to provide one-way paging service on the 152.84 MHz frequency at Bloomsburg (File No. 30423-CD-P/L-1-84) on September 24, 1984 and, as indicated above, at Freeland (File No. 20046-CD-P/L-1-85) on October 3, 1984. Commonwealth filed subsequent applications for 43.66 MHz at 14 locations in Pennsylvania (File No. 23722-CD-P/L-14-85). Because these subsequently filed 43.66 MHz applications were intended to serve the same area as the 152.84 MHz applications, they were considered major amendments to the Bloomsburg and Freeland 152.84 MHz applications pursuant to Section 22.525 of the Rules.[1] Thus, in the *Order*, the MSD dismissed the 152.84 MHz applications.

4. On October 6, 1986, Commonwealth refiled applications for the 152.84 MHz frequency at Freeland (File No. 20046-CD-P/L-1-87), Bloomsburg (File No. 20044-CD-P/L-87) and Williamsport (File No. 20043-CD-P/L-1-87), which were accepted for filing on October 15, 1986.

5. Mobilfone's applications to provide one-way paging service on the 152.84 MHz frequency at Rutland Township and Bloomsburg (File No. 20940-CD-P/L-1-85) and Williamsport (File No. 20948-CD-P/L-1-85), filed on December 10, 1984, were dismissed in the *Order* for failure to request waivers of Section 22.501(h) of the Rules. That section forbade non-wireline companies from applying for frequencies allocated to wireline companies. This separate wireline/non-wireline frequency allocation structure was termed the "fence".[2] Because of our dismissal of its applications in the *Order*, Mobilfone, on December 12, 1986, refiled applications for 152.84 MHz at Williamsport (File No. 21262-CD-P/L-1-87), Bloomsburg (File No. 21264-CD-P/L-1-87) and Rutland Township, (File No. 21263-CD-P/L-1-87), which were accepted for filing on December 24, 1986.

6. Schuylkill's applications to provide one-way paging service on the 152.84 MHz frequency at Catawissa (File No. 20993-CD-P/L-1-85) and Treverton (File No. 22535-CD-P/L-1-85, filed on December 10, 1984, were also dismissed in the *Order* for failure to request similar waivers of the "fence" when it initially applied for these frequencies. Because we dismissed these applications, Schuylkill, on November 17, 1986, refiled applications for 152.84 MHz at Freeland (File No. 20046-CD-P/L-1-87) and Catawissa (File No. 20801-CD-P/L-1-87), which were accepted for filing on November 26, 1986.

7. In summary, in the *Order* the MSD dismissed Commonwealth's applications to provide one-way paging service on the 152.84 MHz frequency at Bloomsburg and Freeland because Commonwealth had filed subsequent applications for 43.66 MHz frequencies throughout Pennsylvania that were considered to be major amendments to the previously filed 152.84 MHz applications. The MSD also dismissed Commonwealth's application to provide one-way paging service on the 152.84 MHz frequency at Williamsport because it was untimely filed pursuant to Section 22.31(c) of the Rules. Finally, the MSD dismissed the applications of Mobilfone to provide one-way paging service on the 152.84 MHz frequency at Rutland Township, Bloomsburg and Williamsport and the applications of Schuylkill to provide one-way paging service on the 152.84 MHz frequency at Treverton and Catawissa for failure to request a waiver of the fence.

II. ARGUMENTS

8. In its application for review, Mobilforne argues that at the time it filed its applications the Commission had eliminated the "fence" and thus, a waiver was unnecessary. In addition, both Mobilfone and Schuylkill argue that because the Commission granted an application of Pacific Telepage, Inc. that failed to request a waiver of the "fence", the MSD abused its discretion by treating similarly situated applicants differently, in violation of applicable precedent. Moreover, relying upon the rules established in *Moore's Service*, 86 FCC 2d 787 (Com. Car. Bur. 1981), and affirmed in *William G. Bowles, Jr.*, Mimeo 6385 (Com. Car. Bur. 1986) (*Bowles*), Mobilfone and Schuylkill argue that their applications should have been retained on file because they filed amendments to their applications, pursuant to Section 22.23(a) of the Rules, to include request for waiver of the "fence". Mobilfone filed its amendments on March 12 and 13, 1985 and Schuylkill filed its amendments on April 1, 1985. Therefore, they claim their applications were cured before the Commission processed them and should be reinstated.

9. Commonwealth argues in its opposition to the applications for review that because the elimination of the "fence" was not effective until January 17, 1985, Mobilfone's and Schuylkill's applications, filed without waiver requests prior to this date, were defective on their face and therefore were properly returned. Commonwealth also states that in filing their applications on December 10, 1984, Mobilfone and Schuylkill could not rely upon the October 18, 1984 *News Release* summarizing the *Fence Order's* elimination of the "fence" because the Commission's Rules clearly state that news releases have no legal significance. Commonwealth also argues that Schuylkill's and Mobilfone's reliance upon *Bowles* is misplaced because, unlike the amendment in *Bowles*, the amendments in this case affected the eligibility of an applicant to apply for a specific frequency. Finally, Commonwealth requests that if we reinstate Mobilfone's and Schuylkill's initial applications, that we either (1) reinstate its previously filed 152.84 MHz applications, or (2) accept its newly-filed 152.84 MHz applications as if filed within the cut-off date of the previously filed applications of Mobilfone and Schuylkill.

10. In their replies, Mobilfone and Schuylkill reiterate the arguments they raised in their applications for review. In addition, they argue that the portion of Commonwealth's opposition which requests that its applications be reinstated should be stricken as procedurally improper and be considered to be an untimely petition for reconsideration of the *Order*.

III. DISCUSSION

11. Mobilfone and Schuylkill argue that their applications were not defective as filed for failure to request waivers of the "fence". They also argue that if their applications were defective as filed, they properly cured the defects by subsequent amendments, and therefore their applications should not have been dismissed. While the first announcement of the Commission's decision to eliminate the "fence" was released on October 18, 1984,[3] the text of the decision was not released until December 11, 1984[4] and took effect January 17, 1985. Prior to this effective date, interim procedures were still in effect which required that non-wireline applicants for wireline frequencies must request a waiver of the "fence".[5] Therefore, the Schuylkill and Mobilfone applications were defective as filed for failure to request such a waiver.

12. However, the Common Carrier Bureau held in *Moore's Service* that "a mutually exclusive application which has not been returned and that is cured by a post cut-off amendment will be retained on file . . . ."[6] In that case, an application for one-way paging facilities was challenged on the adequacy of certain showings contained in the application. The Common Carrier Bureau found that any defects in the original application were minor and had been cured by amendments filed before the applications could be dismissed. The Commission affirmed *Moore's Service* in *Industrial Communications*, 53 Rad. Reg. 2d 38 (1983). Thus, for purposes of the cut-off rule, a cured application will continue to be treated as properly filed on the original filing date notwithstanding the fact that it was defective as filed. Mobilfone filed curative amendments to its applications on March 12 and 14, 1985 and Schuylkill filed similar amendments on April 1, 1985. All the amendments were filed prior to the dismissal of their applications in the *Order*. We conclude that although the applications of Mobilfone and Schuylkill were defective as filed, the defects were properly cured prior to processing[7] and therefore we reinstate the applications of Mobilfone and Schuylkill *nunc pro tunc*.[8]

13. Finally, Commonwealth requests that if we reinstate Mobilfone's and Schuylkill's applications, that we either (1) reinstate its previously filed 152.84 MHz applications, or (2) accept its newly-filed 152.84 MHz applications as if filed within the cut-off date of the Schuylkill and Mobilfone applications even though they were not filed until October 6, 1986. With respect to its Williamsport application, Commonwealth, in its opposition to the applications for review of Mobilfone and Schuylkill, merely reiterates the arguments that it has raised previously. It argues that had Mobilfone not filed its defective application, Commonwealth's Williamsport application would have been timely because the only other application filed was Commonwealth's Freeland application. In addition, the Freeland application would not have been mutually exclusive with its Williamsport application. Therefore, it argues, Mobilfone's application should not be considered in evaluating the timeliness of Commonwealth's applica-

tion. Alternatively, Commonwealth requests the it be granted a waiver of the timeliness requirements of Section 22.31(c) of the Rules.

14. First, with regard to Commonwealth's request that we reinstate its previously filed 152.84 MHz applications, we find that its request is procedurally improper and untimely because it did not file either a petition for reconsideration or an application for review of the *Order* within the deadlines prescribed in Section 405 of the Communications Act and Section 1.106, or in Section 1.115 of the Commission's Rules, nor did it request a waiver of our Rules. Section 405 of the Act, which we cannot waive, requires that petitions for reconsideration of Commission action be filed within thirty (30) days of the date of the public notice of the action at issue. Section 1.115 of the Commission's Rules requires that applications for review of Commission action be filed within thirty (30) days of the date of the public notice of such action. The time Commonwealth should have petitioned for reconsideration of the dismissal of its defective applications expired on September 19, 1986, 30 days after the date of the public notice of the *Order* dismissing its applications. Commonwealth failed to file such a request within that time.[9] Further, because Commonwealth has failed to offer any reason for its failure to file a timely application for review, good cause does not exist for waiving the requirements of Section 1.115 of the Rules that applications for review be filed within the 30-day period. Thus, any arguments concerning the reinstatement of Commonwealth's initial applications are beyond the scope of this decision.

15. Second, Commonwealth's newly filed 152.84 MHz applications were not filed until October 6, 1986 and, thus, were not filed within the cut-off date of Schuylkill's and Mobilfone's original applications and accordingly are dismissed.

IV. ORDERING PARAGRAPHS

16. Accordingly, IT IS ORDERED that the Applications for Review filed by Mobilfone of Northeastern Pennsylvania, Inc. and Schuylkill Mobile Fone, Inc. ARE GRANTED to the extent noted herein.

17. IT IS FURTHER ORDERED that the applications of Mobilfone of Northeastern Pennsylvania, Inc. (File Nos. 20940-CD-P/L-1-85 and 20948-CD-P/L-1-85) and Schuylkill Mobile Fone, Inc.(File Nos. 20939-CD-P/L-1-85 and 22535-CD-P/L-1-85) ARE REINSTATED NUNC PRO TUNC. The newly filed applications of Mobilfone of Northeastern Pennsylvania, Inc. (File Nos. 21262-CD-P/L-1-87, 21264-CD-P/L-1-87 and 21263-CD-P/L-1-87) and the newly filed applications of Schuylkill Mobile Fone, Inc. on November 17, 1986 (File Nos. 20046-CD-P/L-1-87 and 20801-CD-P/L-1-87) ARE DISMISSED.

18. IT IS FURTHER ORDERED that dismissal of the applications of Commonwealth Telephone Company (File Nos. 20046-CD-P/L-1-85, 30423-CD-P/L-1-84 and 21966-CD-P/L-1-85) IS AFFIRMED. The newly filed applications of Commonwealth Telephone Company (File Nos. 20046-CD-P/L-1-87, 20044-CD-P/L-1-87 and 20043-CD-P/L-1-87) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *One - way Paging Stations*, 92 FCC 2d 631 (1982).

[2] *Elimination of the Separate Frequency Allocation Structure in the Public Land Mobile Service*, CC Docket Nos. 83-1146 and 80-57, 99 FCC 2d 311 (1984) (*Fence Order*). The *Fence Order* became effective January 17, 1985.

[3] Public Notice, Report No. 18133, released October 18, 1984.

[4] *Fence Order*, 99 FCC 2d 311 (1984).

[5] *See Revision of Part 22*, 95 FCC 2d 769, 825 (1983).

[6] 86 FCC 2d 787, 795-96 (Com. Car. Bur. 1981).

[7] Commonwealth's opposition is devoid of any discussion of *Moore's Service* and suggests that *Bowles* is distinguishable from this case because the curative amendment in *Bowles* was for a minor defect which did not affect the eligibility of the applicant or the accuracy of the application. In the *Moore's Service* decision, the Bureau indicated that whenever a conventional Public Mobile Services application, that was acceptable for filing, was corrected by a permissible minor amendment before its processing, it would be processed and accorded comparative consideration. Under Section 22.23(c) of the Rules, Mobilfone's and Schuylkill's amendments would be classified as minor. Further, we can find no precedent, and Commonwealth has not cited any authority, for the proposition that amendments of defects affecting eligibility are major amendments which cannot be cured pursuant to *Moore's Service*. Moreover, at the time the applications were filed, the Commission had already announced that the "fence" would shortly be eliminated. Thus, the amendments containing waiver requests of the "fence" did not address a substantive defect in the application. In these circumstances, we conclude that the amendments were minor in nature and they corrected the application's defects.

[8] Mobilfone's and Schuylkill's newly-filed 152.84 MHz applications must now be dismissed as untimely filed because they were not filed within the cut-off date of their original applications which we are reinstating herein. Given our reinstatement of these original applications, we need not address the other arguments raised by Mobilfone and Schuylkill.

[9] Commonwealth's opposition was not filed until October 3, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 29, 1989

WESTERN STATES MICROWAVE TRANSMISSION COMPANY, INC., PETITION FOR DECLARATORY RULING

DFD-89-15

Before the Common Carrier Bureau is a Petition for Declaratory Ruling and an Amendment to Petition for Declaratory Ruling filed on June 12, 1989 by Western States Microwave Transmission Company, Inc., (WSM), a subsidiary of Communications Transmission, Inc. (CTI) pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2. WSM requests a declaratory ruling that "the state of California has no jurisdiction to regulate the operations of an interstate specialized common carrier, and that CTI is such a carrier." WSM further requests a finding that the FCC is the sole authority having jurisdiction to regulate CTI's operation. Comments may be filed within thirty days of the date of this public notice. Reply comments may be filed within thirty days thereafter. Copies of the petition, amended petition, and comments may be inspected and copied at the Commission's Public Reference Room, Rm. 6220, 2025 M St., N.W., Washington, D.C., during the hours of 8:30 a.m. - 12:30 p.m. and 1:30 p.m. - 3:00 p.m. Mondays through Thursdays. Such copies may also be purchased from the Commission's duplicating contractor, International Transcription Services, 2100 M St., N.W., Suite 140, Washington, D.C. 20037, telephone (202) 857-3800.

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-135

In the Matter of

Height and Power Increases in the Public Mobile Service — RM 5555

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1989; Released: June 29, 1989

By the Commission:

I. INTRODUCTION

1. On March 23, 1988, we issued a Notice of Proposed Rule Making (NPRM)[1] requesting comments on proposed changes to our Rules regarding the increase of permissible antenna height and effective radiated power (ERP) for Public Mobile Service (PMS) licensees when the proposed interference contour does not exceed the existing interference contours of co-channel stations operating under the control of the same licensee. The proposed changes would affect Sections 22.100 (frequencies and interference), 22.505 (antenna height-power limits), and 22.506 (radiated power), of the Commission's Rules. The goal of this proposal is to permit more economical and efficient use of the spectrum, without creating interference to other licensees.

II. BACKGROUND

2. We currently limit maximum ERP to 500 watts for stations operating in the 35, 43, 150, and 450 Megahertz (MHz) frequency bands. In addition, we limit ERP to 1000 watts for stations operating in the 931 MHz band. Antenna heights are limited to 500 feet average height above average terrain (AHAAT)[2] for stations operating in the 35, 43, 150 and 450 MHz bands. For stations operating in the 931 MHz band, we limit AHAAT to 1000 feet. Stations that exceed these heights must reduce ERP in accordance with Section 22.505 of the Rules.[3]

3. The NPRM proposed to eliminate or relax the height and power limitations for PMS licensees. The NPRM recognized the fact that many licensees operate large regional systems and, because of the current limitations, must use several transmitters. If the height and power limitations were relaxed, those licensees would be able to serve the same geographic areas with fewer transmitters and, thus, at a reduced cost. However, the NPRM concluded that relaxation of the height and power restrictions creates the potential for an increase in interference and a deterioration in service and therefore solicited comments on the advantages and disadvantages of relaxing restrictions in the various frequency bands utilized by PMS licensees. The most detailed and extensive comments supporting the proposal for modification of the limits to antenna height and radiated power was submitted by TELOCATOR Network of America (TELOCATOR), the largest trade association of PMS companies most directly affected by the height and power rules.[4] Prior to our issuing the NPRM, TELOCATOR proposed modifying the current Rules so that no limitations are put on antenna height and radiated power.[5] In its comments to the NPRM, however, TELOCATOR concedes that no limitation on antenna height and radiated power would not be workable and, therefore, it now proposes increases in antenna height and radiated power limitations as contained in the discussion set forth below.

4. In this Order, we address issues pertaining to Sections, 22.100, 22.505 and 22.506, and amend these Rules accordingly. This Order is divided into three sections; the first addresses radiated power, the second addresses antenna height, and the third addresses general issues concerning both antenna height and radiated power. The contentions of the parties are included in the discussion section. The discussion section is subdivided into five different frequency bands, which are each affected uniquely by this Rule Making.

III. DISCUSSION

A. Power

35 MHz Band

5. The NPRM proposed that 35 MHz stations be permitted to operate with no limitation on power. In its comments TELOCATOR suggests allowing 35 MHz common carrier paging systems to operate with 600 watts of ERP when the interference contours[6] of existing co-channel stations are not exceeded, in order to reduce the potential problems identified by the Special Industrial Radio Service Association, Inc. (SIRSA). SIRSA has raised two concerns about this increase in power. First, they argue, the increase will aggravate an already serious adjacent channel interference problem and second, the operational areas of industrial users will be decreased. National Association of Business and Educational Radio, Inc. (NABER) submits an engineering study which it says shows that a separation distance of 25.7 miles is needed to avoid interference between adjacent industrial and common carrier channels. NABER assumes a desired signal level[7] of -13 dBW (1uV) and an adjacent channel selectivity[8] of 60 dB.

6. The Commission has examined the existing interference potential between low band common carriers and industrial users and finds that our original proposal to permit operation at unlimited power would create potential adverse effects on adjacent channel private radio users. However, we also find that SIRSA's claim does not justify denying reasonable power increases altogether.[9] The hypothetical potential for increased adjacent channel interference is so small that we are convinced that TELOCATOR's proposal for a new maximum ERP of 600 watts for 35 MHz operation is in the public interest.

7. Using the analysis contained in Report and Order, PR Docket No. 84-279, 57 Rad. Reg. 2d (P & F) 1439 (1985) (PR 84-279), we find that a signal level of -125 dBW was assumed for the 150 MHz private services. Using the finding from the Carey Report that low band

VHF desired signal level is 5 dB worse than that for high band VHF[10], we derive a signal of -120 dBW. We conclude from this analysis that the engineering parameters used in CC Docket No. 80-189 are consistent with the adjacent channel protection standards private radio operators have been granted under Commission decisions. NABER does not justify the use of its 60 dB assumption for adjacent channel selectivity. The Commission in CC Docket No. 80-189 has already considered the selectivity factor in the context of adjacent channel interference and concluded that a selectivity value of 65 dB should be utilized. Using the assumptions of a signal level of -120 dBW, selectivity of 65 dB, and free space loss, the separation distance required to avoid interference at 600 watts ERP is 5.7 miles, not 25.7 miles as suggested by NABER. Permitting increased power, however, will increase by 0.5 miles the separation distance[11] between a full power common carrier and an industrial operator, assuming free space loss.[12] The new separation distance required to avoid interference found for the 600 watt stations is 5.7 miles, still within the six mile separation distance adopted in Report and Order, CC Docket No. 80-189, 49 Rad. Reg. 2d (P & F) 1541 (1981) (CC Docket No. 80-189), which allocated certain 35 MHz frequencies for common carrier paging use.

8. We did not intend through this Rule Making to increase interference problems for adjacent channels. We thoroughly analyzed adjacent channel interference potential in the past and do not believe our action today will materially alter existing protections. We believe that the engineering parameters we have used have allowed these two different services to operate without any discernible interference since 1982. We find TELOCATOR's recommendation to operate with a maximum ERP of 600 watts when the interference contours of existing co-channel stations are not exceeded, to be reasonable and unlikely to cause any additional interference. Therefore, because this increase in power will enable more efficient and economical use of the spectrum without detriment to other licensees, we adopt this recommendation.

43 MHz B

9. In the NPRM, we proposed that the existing 500 watt ERP for the 43 MHz band be retained. TELOCATOR asserts that its newly proposed limit of 600 watts for 43 MHz band facilities is minimal and that the power level proposed is the same as currently transmitted by stations operating in the same band authorized under Part 90 of the Rules. In opposition, Association of Maximum Service Telecasters (AMST) and PacTel Paging, Inc. (PACTEL) support the Commission's proposal to maintain the current power limits on paging systems in the 43 MHz band. TELOCATOR has not persuaded us that increasing the ERP for the 43 MHz band will have any additional benefits that could offset increases in interference to television (TV) reception. As we stated in the NPRM, we are already receiving numerous complaints of TV interference caused by 43 MHz transmitters. If a paging system is located within one mile or less of a television receiver, interference is likely to occur. The most likely reason for the interference is the direct signal pickup by the intermediate frequency (IF) components of the TV receiver. Because we have received a significant number of complaints alleging interference to TV receivers our normal practice is to license paging facilities in the 43 MHz band on a developmental basis. If interference to TV receivers occurs and cannot be resolved, the authorization is terminated. If interference does not occur, the developmental status is terminated and the authorization is granted. Given this history of interference with TV receivers from paging facilities operating at 43 MHz and the likelihood that operation at increased power levels will exacerbate this existing problem, we do not believe it is in the public interest to further increase the permissible power level for 43 MHz transmitters.

150 MHz Band

10. The NPRM proposed that carriers operating in the 150 MHz band be permitted to operate with unlimited power. TELOCATOR now suggests that we adopt a new limitation with a maximum ERP in this band up to 1400 watts when the interference contours of existing co-channel stations are not exceeded. Several commenters raised concerns that TELOCATOR's proposal for a maximum power of 1400 watts in the 150 MHz band would lead to an increase in adjacent channel interference. Associated Public-Safety Communications Officers, Inc. (APCO) stated that public safety users in the 158-159 MHz band are already experiencing interference from common carrier paging operations on the 158.70 MHz frequency. The common carrier frequency of 158.70 MHz is adjacent to 158.73 MHz which is used in the Police Radio Service. NABER submitted an engineering study showing that VHF common carrier stations operating at 1500 feet HAAT with an ERP of 1400 watts would have to be separated from adjacent channel private radio systems by 28.3 miles in order to avoid interference. NABER used a signal strength of -13 dBu and a selectivity factor of 65 dB to determine the required separation distance. NABER asserts that VHF systems operating from building tops typically use 1000 watts of power. TELOCATOR contends that private systems in the VHF band can have transmitter power outputs (TPO) of 350 watts. This power, coupled with the use of a 6 dB gain, omni-directional antenna with no line loss, produces 1400 watts ERP. SIRSA asserts that because of the nature of motion picture production[13], motion picture production licensees operating on the 152.87 MHz frequency band would suffer from adjacent channel interference because some motion picture production uses two-way base stations located near common carrier stations.

11. As stated previously, we are concerned that our proposals to increase power limitations in the PMS do not increase interference potential to other licensees. Nevertheless, NABER's assumptions are not consistent with the engineering parameters used by the Commission in previous proceedings. The 65 dB selectivity used by NABER is 10 dB below the 75 dB found to be appropriate to prevent interference in PR Docket No. 84-279. Further, the received signal level of 1uV (-137 dBW) is 12 dB lower than the -125 dBW signal level we used to define reliable service in PR Docket No. 84-279. Using these parameters, the required separation distance between a private radio base receiver and a common carrier base transmitter operating in the 150 MHz band is 1.7 miles for an ERP of 1400 watts (free space loss assumed).[14] The separation distance for the current maximum of 500 watts is 1.0 mile.

12. As we have shown above, the separation distance between common carrier paging stations in the 150 MHz band operating at 1400 watts (free space loss assumed), and adjacent channel private base station operations on

152.87 MHz would be 1.7 miles. Under the existing power limit, 500 watts, an adjacent private radio system would probably receive interference in an area of 3.1 square miles around the adjacent common carrier station. The proposed 1400 watt limit would increase the area of potential adjacent channel interference to 9.1 square miles, a three fold increase.

13. Additionally, we have examined the Commission's Master Frequency Data Base (XFS)[15] for the business radio paging frequency 152.48 MHz and found that a number of private radio base stations operate with an ERP of 2000 watts. A large number of stations operate with powers between 1000 and 2000 watts. The following common carrier frequencies are adjacent channel to Private Radio channels operating both as base and mobiles:

PLMRS Frequency (MHz)	Private Radio Service Frequency (MHz)	Private Use
152.24	152.27 Taxicab Radio Service	Base and Mobile
152.84	152.87 Special Industrial Radio Service and Motion Picture Radio Service	Base and Mobile
158.10	158.13 Power Radio Service	Base and Mobile
158.70	158.73 Police Radio Service	Base and Mobile

14. Balancing our goals of permitting carriers to use frequencies in an efficient manner with reduced interference potentials, we believe it is in the public interest to adopt TELOCATOR's proposal for a maximum power of 1400 watts for the 152 MHz band when the interference contours of existing co-channel stations are not exceeded. However, for common carrier channels channels 152.24, 152.84, 158.10, and 158.70 MHz which are adjacent to private radio channels 152.27, 152.87, 158.13, and 158.73 MHz we believe it is in the public interest to retain the current 500 watt limitation to avoid adjacent channel interference.

450 MHz Band

15. The NPRM, as with some other frequency bands, proposed that there be no power limitations for the 450 MHz band. TELOCATOR requests that the Commission adopt a rule setting a maximum ERP of 3500 watts for 450 MHz base stations when the interference contours of existing co-channel stations are not exceeded. TELOCATOR bases its request on the assumption that it is possible for private radio systems in the 450 MHz band to operate with a 10 dB gain antenna with a TPO of 350 watts which equals 3500 watts ERP. NABER disagrees with TELOCATOR's study and asserts that 450 MHz stations on building tops typically operate with a maximum ERP of 2500 watts. We have examined the XFS for the business radio paging frequency 462.750 MHz and find that several base stations operate with an ERP of 3500 watts and a large number of stations operate with ERP between 1000 and 3500 watts.

16. The Commission staff has calculated the required separation distance between an adjacent channel base transmitter and an adjacent channel receiver. The receiver selectivity used was 75 dB. The required signal strength, from the Carey Report, was found to be -133 dBW (free space loss assumed). For a maximum power of 500 watts, the required separation distance to avoid interference from co-channel stations is 0.9 mile. For the proposed power of 3500 watts, the distance is 2.4 miles.

17. Because its request will result in more efficient and economical use of the spectrum, we believe that with the one exception noted below, it is in the public interest to adopt TELOCATOR's proposal for a maximum power of 3500 watts for the 450 MHz band when the interference contours of existing co-channel stations are not exceeded.

18. Under the existing 500 watt power limitation, an adjacent private radio system would receive potential interference in an area of 2.5 square miles around the adjacent common carrier station. The proposed 3500 watt limit would increase the area of potential adjacent channel interference to 18 square miles, a seven-fold increase. The following common carrier frequency is an adjacent channel to a private radio channel operating both as a base and mobile unit:

PMS Frequency (MHz)	Private Radio Service Frequency (MHz)	Private Use
454.025	454.000 Petroleum Radio Service	Base and Mobile

Accordingly, for the same reasons we created an exemption for common carrier channels adjacent to private radio channels in the 150 MHz band, we believe it is in the public interest to retain the current 500 watt limitation for the common carrier channel 454.025 MHz which is adjacent to the private radio channel 454.000 MHz.

931 MHz Band

19. In the NPRM we proposed that common carriers operating in the 931 MHz band would not have limits on ERP when the interference contours of existing co-channel stations are not exceeded. TELOCATOR requests that carriers be permitted to use 3500 watts ERP for stations in the 931 MHz frequency band when the interference contours of existing co-channel stations are not exceeded. TELOCATOR compares its requested increase in power to the typical power allowed for a 450 MHz private radio system. In its comments, TELOCATOR proposes the increase in power for 931 MHz facilities in order to achieve parity between common carrier and private radio licensees. Other commenters argue that we currently do not have technical standards to resolve interference problems at above 1000 watts ERP for stations in the 931 MHz frequency band.

20. Currently, Part 22 and Part 90 operators both have limits of 1000 watts at 1000 AHAAT in the 929-931 MHz band. TELOCATOR offers no rationale for comparing radiated power or height limits for the 931 MHz band in Part 22 with the 450 MHz band in Part 90. Given that there is an insufficient record in this proceeding to alter the current power limitation for the 931 MHz band, we will not grant the proposed increase at this time.

B. HEIGHT

Field Strength Prediction Curves

21. In the NPRM we proposed that licensees be permitted to use unlimited height when the interference contour of a proposed station does not exceed the interference contour(s) of existing co-channel stations. This Commission, in the NPRM, raised concerns that the prop-

agation curves used to calculate service and interference contours for the common carrier public mobile service did not accurately predict these contours for higher values of HAAT. TELOCATOR's request is identical to the Commission's height proposal. PACTEL comments that the curves exhibit anomalous behavior for distances beyond 50 miles and for heights above 1000 feet HAAT. New England Telephone and Telegraph Company (NET) believes that the Carey curves do not accurately predict co-channel interference. NET would require actual field strength measurement to be done. AMST would keep the current limit on antenna height for stations in the 43 MHz band. AMST contends that if height is increased, interference to TV will be increased. Cue Paging Corporation (CUE) asserts that the current technical restrictions are not precise enough to resolve interference problems.

22. TELOCATOR agrees with the Commission's assessments of the current field strength prediction curves and notes that the Carey curves predict a 6 dB/octave[16] increase in field strength for heights above 500 feet HAAT while the Okumura study[17] predicts 9 dB/octave. TELOCATOR asserts that the adoption of new curves or the use of correction factors in conjunction with the present Carey curves would introduce "discontinuities" between those stations that comply with the current standards and any future licensed stations. TELOCATOR states that the solution lies in adopting new curves, but concedes that this is beyond the scope of this Rule Making.

23. TELOCATOR notes that those portions of the curves that the Commission believes to be inaccurate must currently be used when the height-power reduction table of Section 22.505 is used for stations with heights above 500 feet HAAT and when the height power limits are exceeded on individual radials.[18] While it is true that some stations must use those portions of the curves whose accuracy is in question to determine interference and service contours, we do not find it to be in the public interest to allow a new class of stations to potentially cause harmful interference to existing co-channel stations by using those same inaccurate curves in determining reliable service ares and interference contours.[19]

24. We agree with TELOCATOR's assessment that adopting new curves at this time is beyond the scope of this Rule Making. This Commission will invite comments on field strength prediction curves in a separate proceeding. Because of the admitted inaccuracy of the existing curves, and due to the increased possibility of interference, we find that, at this time, the current height limitation for stations in the 35, 43, 152, and 454 MHz bands should remain at 500 feet average HAAT. As we have previously stated, TELOCATOR has not justified any increases in either height or power for most 931 MHz stations.

25. The Commission in the NPRM proposed to allow the three nationwide paging channel in the 931 MHz band to operate without height restrictions. All the comments received in response to this specific proposal were supportive. Since the channels are controlled nationwide by the same entity interference will not be a problem. Moreover, this change will permit more efficient and economical operations. Accordingly, we amend the rules to adopt this change.

C. General Antenna Height and Radiated Power Considerations

Basic Exchange Telephone Radio Service (BETRS)

26. Pacific Bell and Nevada Bell (PACIFIC) assert that the rule changes proposed in the NPRM will have an adverse impact on the development of BETRS. PACIFIC contends that additional spectrum will be used under this proposal to allow for increased ERPs when the interference contour of a proposed station does not exceed the interference contour(s) of existing co-channel stations, thereby foreclosing BETRS use of this spectrum at a critical time in BETRS' evolution. BETRS currently shares the spectrum in the 150 and 450 MHz with PMS. In its only example of this adverse impact, PACIFIC contemplated inaccurately that the existing interference contour of co-channel stations could be expanded.

27. We find PACIFIC's argument to be without merit. Under the new rules the interference contours for new stations exceeding the existing power limits will not be permitted to exceed the interference contours of existing co-channel stations and therefore no new potential service area will be lost and additional spectrum will not be used. Thus, the Commission's commitment to BETRS will not be affected by these rule changes.

Environmental Assessment

28. The NPRM requested comments on whether Part 22 applicants should be required to comply with Section 1.1307(b) (radio frequency exposure in excess of guidelines) and if so, at what levels of power a determination of radiation exposure should be required. Telocator does not believe that applicants should be required to submit showings concerning radiation hazards. The National Environmental Policy Act (NEPA)[20] requires federal agencies to consider as a factor in making a public interest determination whether an action will have a significant effect on the quality of the human environment. Operation of radio transmitters in certain circumstances may result in human exposure to radio frequency radiation. In adopting rules to implement NEPA, the Commission concluded that operation of radio transmitters which result in radio frequency radiation levels in excess of the guidelines established by the American National Standards Institute (ANSI),[21] would constitute a significant effect on the human environment.[22] Nevertheless, we created a categorical exemption for certain classes of licensees, including Part 22 licensees, because operating parameters for those licensees in effect at the time, created little or no risk of harmful human exposure to radiation. Threfore, we must now consider whether the changes in operating parameters adopted today alter the basis for granting the categorical exemption for Part 22 licensees.

29. We have calculated expected power densities resulting from the new power limitations adopted in this Rule Making by modeling the transmitting antennas as half-wave dipoles. We believe that this modeling technique represents a "worst-case" analysis for these antennas. This model incorporates information on vertical radiation pattern as well as expected ground reflection. In the 450 MHz band, the results show that it would be essentially impossible for the FCC-specified exposure guidelines for radiofrequency radiation (ANSI C95.1-1982) to be exceeded by single antennas unless height above ground is less than 13 to 14 feet for a transmitter operating at the maximum ERP of 3500 watts.

Similarly, for PMS carriers in the 150 MHz band, minimum antenna height would need to be 11 to 12 feet operating at a maximum ERP level of 1400 watts in order for the ANSI guidelines to be exceeded. Operation at such high powers and such low heights is extremely unlikely, since height above ground is virtually always at least 20 feet. We have no evidence before us that any Part 22 stations in fact are operating at such low heights. Therefore, at this time, we see no reason to alter the categorical exemption previously granted to all Part 22 licensees.[23] However we may revisit this matter in the future if justified by new data, *e.g.*, evidence that some Part 22 transmitters are in fact operated at such low heights with maximum power. We also point out that Sections 1.1307(c) and 1.307(d) of the Commission's Rules include procedures to enable the Commission to consider the potential environmental impact of proposed operations even for stations which are subject to a categorical exemption. Section 1.1307(c) allows any interested individual to file a petition with the Commission requesting that enviromental factors be taken into account in any Commission action. Section 1.1307(d) permits the Bureau to take environmental factors into consideration on its own motion in taking any action, and if the Bureau receives any Part 22 applications that, in fact, have heights and powers outside the parameters discussed above, we expect it to review carefully the RF radiation effects of any such applications. Therefore, we conclude that continuation of the categorical exemption for Part 22 licensees in Section 1.1307 is consistent with our obligations under NEPA.

Blanketing Interference

30. In support of our suggestion in the NPRM, AMST urges the Commission to adopt a rule on blanketing interference.[24] AMST proposes that we adopt the method of calculation used in Section 73.318 of the Rules.[25] TELOCATOR contends that a rule on blanketing interference is unnecessary. We have reviewed the comments and replies and determined that a rule on blanketing for Part 22 licensees would serve the public interest. Currently, when Commission staff receives a complaint of interference to electronic equipment caused by a common carrier, the complaint is handled on a case-by-case basis because no clear guidelines have been established to determine the level of protection required. A blanketing rule will delineate the responsibility of the carrier and foster efficient resolution of problems without the necessity of Commission intervention. This rule will also relieve carriers of the responsibility of protecting non-radio frequency (non-RF) devices such as telephones, amplifiers and tape recorders. We will adopt the same formula as stated in Section 73.318 of the Rules.[26]

IV. REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

31. **Reasons for action and objectives**. The Rule Making will enhance the efficiency of PMS operations because fewer transmitters will be needed to cover the same geographic area. In addition, building penetration will be increased, and the PMS systems' ability to overcome man-made noise will be improved. Our objective is to provide service to the public with greater speed and efficiency.

32. **Issues raised by the public in response to the initial analysis**. We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments, whenever possible, we have modified our proposal so as to permit both economical and efficient spectrum use but without creating interference to other services. For example, TELOCATOR originally proposed modifying the current Rules so that no limitation would be put on antenna height and radiated power. In its comments to the NPRM, however, this commenter conceded that no limitation on antenna height and radiated power would not be workable and proposed increases in antenna height and radiated power limitations. Based on their suggestions and those of other commenters, in this order, we modify our proposal and amend Parts 1 and 22 of the Rules to permit increased antenna height and radiated power, under certain circumstances.

33. **Alternatives that would lessen impact**. We have determined no specific alternatives which could accomplish the objective achieved in this Rule Making order. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to carry out out duties under the Communications Act of 1934. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

34. **Paperwork Reduction Act Statement**. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose a new or modified information collection requirement on the public.

V. ORDERING CLAUSES

35. WHEREFORE, for the foregoing reasons, Part 22 of the Commission's Rules IS HEREBY AMENDED as discussed herein and as shown in Appendix 2 below, effective **August 14, 1989.**

36. IT IS FURTHER ORDERED that CC Docket No. 88-135 proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX 1

COMMENTS

A Air-Alert

All City Paging, Inc.

American Paging, Inc.

Associated Public-Safety Communications Officers, Inc.

Association of Maximum Service Telecasters, Inc.

Beeper Rental Service

Communications Engineering Company, Inc.

Cue Paging Corporation

Hello Pager Company

Modern Communications Corporation

National Association of Business and Educational Radio, Inc.

National Radio Astronomy Observatory

National Satellite Paging, Inc.

New England Telephone and Telegraph Company

Pacific Bell and Nevada Bell

PACTEL Paging, Inc.

Paging Network, Inc.

Personal Communications Inc.

Rule Radiophone Service, Inc.

Special Industrial Radio Service Association, Inc.

TELOCATOR Network of America

Reply Comments

Communications Engineering Company, Inc.

Cue Paging Corporation

National Association of Business and Educational Radio, Inc.

New England Telephone and Telegraph Company

Paging Network, Inc.

Special Industrial Radio Service Association, Inc.

TELOCATOR Network of America

APPENDIX 2

RULES SECTION

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C. 553), unless otherwise noted.

2. Section 22.100 is amended by adding paragraph (e) to read as follows:

Section 22.100 Frequencies, Interference

* * * * *

(e) *Blanketing*. Areas adjacent to the transmitting antenna that receive a signal strength of 115 dBu or greater will be assumed to be blanketed. In determining the blanketed area, the 115 dBu contour is determined by calculating the inverse distance field using the maximum radiated lobe of the antenna without considering its vertical radiation pattern or height. For directional antennas, the effective radiated power in the pertinent bearing shall be used.

(1) The distance to the 115 dBu contour is determined using the following equation:

$$D \text{ (in miles)} = 0.245 \times (P)^{1/2}$$

Where P is the maximum effective radiated power (ERP), measured in kilowatts, of the maximum radiated lobe.

(2) Licensees of new or modified stations ("licensee(s)") must resolve all complaints of blanketing interference (as defined in this Section) which are received by licensee within one year of filing a "Notification of Status of Facilities," FCC Form 489. Resolution of complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices are also excluded.

(3) A licensee co-locating with one or more existing licensees must assume full financial responsibility for remedying new complaints of blanketing interference for a period of one year. Two or more licensees concurrently co-locating facilities are jointly responsible for remedying blanketing interference unless the Commission can readily determine the offending station and then that station shall assume full responsibility.

(4) Following the one year period of full financial responsibility to satisfy blanketing complaints, licensees shall provide technical information to complainants on remedies for blanketing interference.

3. Section 22.505 is amended by adding paragraph (c) to read as follows:

Section 22.505 Antenna height-power limit.

* * * * *

(c) Base stations in the 35, 43, 152, and 454 MHz bands that exceed a maximum effective radiated power of 500 watts, pursuant to section 22.506(f), may not exceed 500 watts in any radial direction where the height above average terrain exceeds 500 feet. Base stations on 931.8875, 931.9125, and 931.9375 MHz are exempt from the height limits of this section.

4. Section 22.506 is amended by adding paragraph (f) to read as follows:

Section 22.506 Power.

* * * * *

(f) Proposed base stations, other than in the air-ground radio service, the 43 MHz band, 152.24, 152.84, 158.10, 158.70 and 454.025 MHz, the 470-512 MHz band, and the 931 MHz band, whose interference contours do not ex-

ceed the interference contour(s) of existing co-channel station(s), which are operated under the control of the same licensee, may operate with the following power limits:

Frequency Band	Maximum Effective Radiated Power
35 MHz	600 Watts
152 MHz	1400 Watts
454 MHz	3500 Watts

FOOTNOTES

[1] 3 FCC Rcd 1710 (1988).

[2] HAAT is defined as the height of the antenna radiation center above the average terrain elevation between 2 and 10 miles from the antenna site along a particular radial. AHAAT is the average of the HAATs found for the 8 radials spaced at 45 degrees of azimuth starting at True North.

[3] Section 22.505 delineates the maximum ERP a base station may operate at, when the AHAAT exceeds 500 feet (for the 931 MHz band AHAAT is 1000 feet). The rule contains power reduction tables indicating that at lower ERPs, a carrier may operate at increased heights.

[4] *See* Appendix 1 for a list of Commenters.

[5] *See* Request for Notice of Proposed Rule Making, RM 5555.

[6] Interference and service contours are defined in Section 22.504 of the Commission's Rules and in the report by R. B. Carey entitled "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service" (Carey Report), FCC Report No. R-6406 (June 1964).

[7] A signal level is the difference between the measure of the signal at any point in a transmission system and the measure of an arbitrary reference signal.

[8] Selectivity is the ability to select one particular signal from other signals at nearby frequencies.

[9] In the only example SIRSA cited, two common carriers, Radio Relay Corporation, operating on 43.22 MHz, and Metromedia Paging Services, Inc., operating on 43.20 MHz were allegedly producing interference. Freeport, the industrial operator, operated on 43.28 MHz, 60 kHz removed from the nearest adjacent channel. The two common carrier stations were not adjacent channels and, by themselves, could not have caused the intermodulation interference that was alleged.

[10] The Carey Report did not take actual measurements for the desired signal level for low band VHF. Rather, the Carey Report determined the signal level by noting that "the ambient noise level at that frequency is generally considered to be about 5 decibels (dB) worse than that at 150 Mc/s [Megacycles]".

[11] In calculating the mileage differential, Commission staff assumed only free space loss, and used the field strength and selectivity figures from CC Docket No. 80-189, 49 Rad. Reg. 2d (P & F) 1541, at Appendix E (1981) (CC Docket No. 80-189). The distances are 5.2 miles for 500 watts, and 5. miles for 600 watts.

[12] Free space loss is a transmission loss where free space conditions apply. Free space is defined as a straight line transmission of a radio wave through a vacuum or an ideal atmosphere, without absorption, reflection, or diffraction of energy by nearby objects.

[13] Some motion picture production involves the use of two-way, base-mobile communications.

[14] The Commission assumed free space loss, a desired receive level of - 125 dBW, and an adjacent channel selectivity of 75 dB. It should be noted that these mileage figures differ from those given in the NPRM at para. 20. Originally, the Commission used a desired receive level of -122.9 dBW derived from the Carey Report. TELOCATOR pointed out that private radio used a value of -125 dBW, and we agree that, consistent with prior Commission decisions, it is appropriate to use this value.

[15] The Master Frequency Data Base, referenced in the United States Department of Commerce, National Technical Information Service, "Catalog of Data Files" at p.40, referred to as XFS, contains data from granted licenses issued by various bureaus of this Commission.

[16] An octave is an interval between two heights such that one height is twice the other.

[17] Y. Okumura *et.al.*, 16 Rev. Elec. Commun. Lab. 825-873 (Sept. - Oct., 1968), reprinted at Land Mobile Communications Engineering (Brodson *et. al.*, ed. 1967).

[18] The height-power limits may be exceeded on an individual radial because the overall limit on power is based on the average height above average terrain of all eight cardinal radials.

[19] For example, assume that two 152 MHz stations are 104 miles apart. The first station (protected) operates at 500 watts ERP at 500 foot HAAT. The second station (interferer) operates at 1400 watts ERP at 1000 foot HAATs. The present Carey curves predict that no interference will occur between these two stations. However, if we assume that the Carey curve at 1000 feet underestimates the received signal by 3 dB, as TELOCATOR has suggested, then the protected station receives harmful interference to 3% or 64.5 square miles of its protected service area.

[20] 42 U.S.C. §§ 4321-4335.

[21] *See* "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," ANSI C95.1-1982.

[22] A licensee which proposes to operate a radio station which would have a significant effect on human exposure to radio frequency must file an environmental assessment in accordance with Sections 1.1308 and 1.1311 of the Rules.

[23] Section 1.1307(b).

[24] Blanketing interference is defined as "(t)he action of a powerful radio signal or interference in rendering a receiving set unable to receive desired signals." IEEE Standard Dictionary of Electrical and Electronic Terms, The Institute of Electrical and Electronic Engineers, Inc., STD 100-1972.

[25] *See* Section 22.100 at Appendix III. Section 73.318 codifies the rules on blanketing for FM radio.

[26] D (in miles) = 0.245 X SQRT P(kilowatts).

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